(1)

No. 95-232-CFX
Status: GRANTED

Title: Lloyd Henderson, Petitioner
v.
United States

Docketed:
August 8, 1995

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Sheehy,Richard A.

Counsel for respondent: Solicitor General

Ptn due & mld 8-8-95, see ml label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Aug 8 1995	G	Petition for writ of certiorari filed.
3	Sep 7 1995		Order extending time to file response to petition until October 11, 1995.
4	Oct 11 1995		Brief of respondent United States in opposition filed.
5	Oct 25 1995		DISTRIBUTED. November 9, 1995 (Page 1)
7	Nov 17 1995		REDISTRIBUTED. November 22, 1995 (Page 26)
8	Nov 22 1995		Petition GRANTED.
			**********
9	Dec 15 1995		Record filed.
		*	Original record proceedings United States District Court for the Eastern District of Texas.
10	Dec 22 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fifth Circuit.
12	Jan 4 1996		Order extending time to file brief of petitioner on the merits until January 16, 1996.
13	Jan 8 1996		Joint appendix filed.
14	Jan 16 1996		Brief of petitioner Lloyd Henderson filed.
15	Jan 24 1996		SET FOR ARGUMENT TUESDAY, MARCH 19, 1996. (2ND CASE).
16	Jan 29 1996		CIRCULATED.
17	Feb 20 1996	X	Brief of respondent United States filed.
18	Mar 12 1996	X	Reply brief of petitioner Lloyd Henderson filed.
19	Mar 19 1996		ARGUED.

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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1995

LLOYD HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the 120-day service requirement of Federal Rule of Civil Procedure 4 supplants the forthwith service requirement found in the Suits in Admiralty Act ("SAA").

II. If the 120-day service requirement of Rule 4 does not supplant the forthwith service requirement found in the SAA, whether district courts may extend the time for service provided by the SAA under appropriate circumstances.

LIST OF ALL PARTIES

Petitioner:

LLOYD HENDERSON
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25025 I-45 North, Suite 525
The Woodlands, TX 77380

Respondent:

UNITED STATES OF AMERICA
C/O SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

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REFERENCE TO THE OPINIONS OF THE COURTS BELOW

Court of Appeals Opinion: 51 F.3d 574 (5th Cir. 1995) – Reproduced in Appendix

District Court Order: Reproduced in Appendix

STATEMENT OF JURISDICTION

The Fifth Circuit rendered its opinion on May 10, 1995. Petitioner did not file a motion for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Suits in Admiralty Act, 46 U.S.C. § 742

Libel in personam.

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding in personam may be brought against the United States or against any corporation mentioned in section 1 of this Act. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney

General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

Rules Enabling Act, 28 U.S.C. § 2072

Rules of procedure and evidence; power to prescribe.

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Fed. R. Civ. P. 4 (d) (4) and (5)[1]

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

Fed. R. Civ. P. 4 (j)[2]

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of

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[1] These subsections were amended in 1993 and renumbered as Rule 4 (i).

[2] The 1993 amendments reworded this subsection and renumbered it as Rule 4 (m).

the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

STATEMENT OF THE CASE

Petitioner Lloyd Henderson sustained injuries on August 27, 1991, while employed by the United States as a seaman aboard the M/V DELMONTE, a ship owned by the United States (R 3-4). After exhausting administrative remedies, he filed suit against the United States on April 8, 1993, in the United States District Court for the Southern District of Texas, Galveston Division (R 2).[3] Jurisdiction arose under the Suits in Admiralty Act ("SAA"), 46 U.S.C. § 741-752 and the Public Vessels Act, 46 U.S.C. §§ 781-790.

Mr. Henderson experienced a series of difficulties obtaining a proper summons for the United States from the district clerk's office (R 163). As a result, Mr. Henderson did not serve his complaint via certified mail on the United States Attorney General until May 19, 1993, over a month after filing suit (R 163). The summons intended for the United States Attorney, however, was still not in proper form at that point because the deputy district clerk had failed inadvertently to place the seal of the

[3] On motion by the United States, the case was later transferred to the Eastern District of Texas, Beaumont Division (R 1).

court on the summons. A state constable noticed the defect and, after a further series of difficulties with the district clerk's office, Mr. Henderson finally obtained a properly sealed summons on August 25, 1993, just two days before the statute of limitations elapsed (R 164).

Mr. Henderson then filed a motion seeking an extension of time in which to serve the United States Attorney (R 12-13). The district court, after presumably finding good cause as required by Rule 4, granted the extension and rendered an order allowing service on or before September 15, 1993 (R 16). The United States Attorney received personal service on September 3, 1993. Thereafter, the United States moved to dismiss the case for want of jurisdiction due to a lack of "forthwith" service as required by the SAA (R 34). The district court originally denied the motion, presumably believing that Rule 4 governed the time for service in the case and that the court had the power to grant an extension (R 107). Following the court's ruling, however, the Fifth Circuit delivered its opinion in *United States v. Holmberg*, holding that the SAA's forthwith requirement rather than Rule 4 governs the time for service on the United States. 19 F.3d 1062 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 482 (1994). The district court reconsidered its ruling in light of *Holmberg* and granted the government's motion to dismiss without prejudice but after the statute of limitations had elapsed (R 189). Mr. Henderson appealed to the Fifth Circuit to no avail. The Fifth Circuit merely reiterated its opinion in *Holmberg* that the SAA's forthwith requirement rather than Rule 4 governs the time for service on the United States.

REASONS FOR GRANTING THE WRIT

A. This Court Should Grant the Writ Because the Fifth Circuit's Interpretation of the SAA's Forthwith Service Requirement Conflicts with Third Circuit Precedent.

The manner of service on the United States under the SAA and Rule 4 is the same. Both require that the plaintiff personally serve the United States Attorney for the district in which the suit is filed[4] and, additionally, serve the Attorney General by mail.[5] Rule 4 and the SAA collide, however, with respect to the time for service on the United States. The SAA fails to provide any specific time for service on the United States, but rather simply provides that service be "forthwith." Rule 4, on the other hand, provides a specific time limit of 120 days in which to accomplish service and permits the district court to extend the time upon a showing of "good cause."

Thus the question of which rule regarding the time for service on the United States arises in suits brought under the SAA. The Third Circuit has determined that Rule 4's 120-day requirement supersedes the SAA's forthwith requirement. *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 66 (3d Cir. 1985). Several district courts have held likewise. *E.g., Libby v. United States*, 657 F. Supp. 1251, 1252 (M.D. Fla. 1987), *aff'd*, 840 F.2d 818 (11th Cir. 1988); *Phillips v. United States Army Corps of Engineers*, 629 F. Supp. 967, 971 (S.D.

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[4] After the filing of this suit, Congress amended Rule 4 to permit the United States Attorney to designate agents to receive process and to permit service on the United States Attorney by mail.

[5] The SAA specifies registered mail; Rule 4 permits registered or certified mail.

Miss. 1986). Other circuits addressing the issue, however, have concluded that the SAA's forthwith requirement applies regardless of Rule 4's 120-day requirement. *E.g. City of New York v. McAllister Brothers, Inc.*, 278 F.2d 708, 710 (2d Cir. 1960); *Owens v. United States*, 541 F.2d 1386, 1388 (9th Cir. 1976), *cert denied*, 430 U.S. 945 (1977); *Holmberg*, 19 F.3d at 1065.

For the most part, the conflict arises from the determination of whether the SAA's forthwith service requirement is substantive or simply procedural. Those courts that consider the forthwith requirement substantive hold that it applies without regard to Rule 4 because the Federal Rules of Civil Procedure do not modify substantive rights. *E.g., Battaglia v. United States*, 303 F.2d 683, 686 (2d Cir.), *cert. dism'd*, 371 U.S. 907 (1962). Those courts that consider the forthwith service requirement procedural hold that Rule 4's 120-day requirement supplants the SAA's forthwith requirement because the Federal Rules supplant all conflicting procedural requirements in federal courts. *E.g., Jones & Laughlin Steel*, 772 F.2d at 66.

Significantly, the leading precedents construing the SAA's forthwith requirement were decided *prior to* the application of the Federal Rules to admiralty suits in 1966. *See* Amendments to Rules of Civil Procedure for the United States District Courts, reported in 383 U.S. at 1029, 1030-1031 (1966). For instance, in *McAllister Brothers*, the plaintiff served process on the United States Attorney more than two months after filing suit. 278 F.2d at 708. The court held that the plaintiff's failure to comply with the SAA's forthwith service requirement deprived the district court of jurisdiction and compelled dismissal. *Id.* at 710.

Two years later in *Battaglia v. United States*, the court reached an even harsher result. 303 F.2d at 683. There, the plaintiff served the United States Attorney on the same day he filed the complaint. The plaintiff failed to serve the Attorney General by registered mail, however, until sometime later. The court construed the SAA to require both forthwith service on the United States Attorney and forthwith service by registered mail on the Attorney General. Accordingly, the court held that the lack of forthwith service warranted dismissal. *Id.* at 686. The rationale for the decision was that the forthwith service requirement constitutes a prerequisite to the United States' waiver of sovereign immunity.

In 1966, Congress amended the Federal Rules of Civil Procedure to apply them to admiralty suits. Amendments to Rules of Civil Procedure for the United States District Courts, reported in 383 U.S. at 1030-1031. Following the application of the Federal Rules to admiralty suits in 1966, the Ninth Circuit nonetheless adopted the long-held view of the Second Circuit that forthwith service of process constitutes a matter of jurisdiction. *Owens*, 541 F.2d at 1388; *see also Barrie v. United States*, 615 F.2d 829, 830 (9th Cir. 1980) (following *Owens*); *Kenyon v. United States*, 676 F.2d 1229, 1231 (9th Cir. 1981) (following *Owens*); *Amella v. United States*, 732 F.2d 711, 713 (9th Cir. 1984) (following *Owens*). More recently, the Eleventh and Fifth Circuits also have adopted the view that forthwith service constitutes a matter of substance unaffected by the Federal Rules. *Libby v. United States*, 840 F.2d 818 (11th Cir. 1988); *Holmberg*, 19 F.3d at 1065; *Henderson*, 51 F.3d at 576.

The Third Circuit, however, has used a more reasonable analysis in part because the other circuits have relied on the law before the Federal Rules applied to admiralty suits. In *Jones & Laughlin Steel*, the plaintiff filed suit on January 18, 1984, and sent notice to the appropriate federal agency the next day but failed to serve the Attorney General and United States Attorney until late March, well within the 120 days required by Rule 4 but not "forthwith" as required by the SAA. 772 F.2d at 66. The court logically concluded that the SAA's forthwith service requirement constituted a matter of procedure rather than substance. *Id.* at 66. In so concluding, the court relied on the fact that Congress unified admiralty procedure and the Federal Rules in 1966. *See* Amendments to Rules of Civil Procedure for the United States District Courts, reported in 383 U.S. at 1030-1031. Thus, the court reasoned that the provisions for service of process found in Rule 4 should govern service on the United States under the SAA. Specifically, the court held:

> This congressional enactment of a uniform 120-day period for accomplishing service of process [under Rule 4] must be read in light of 28 U.S.C. § 2072, [the Rules Enabling Act] which states that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Rule 4(j) therefore supersedes the Suits in Admiralty Act's requirement of forthwith service.

772 F.2d at 66.

At least two district courts have adopted the Third Circuit's reasoning. *Phillips*, 629 F. Supp. at 971; *Libby*, 657 F. Supp. at 1252. Other district courts, though bound by

circuit precedents to the contrary, have expressed agreement with the Third Circuit's construction of the SAA. For instance, in *O'Halloran v. United States*, the court stated: "This Court finds the Third Circuit approach reasonable, particularly in light of the inherently ambiguous nature of the term forthwith. This Court also believes that rejecting the argument that Sec. 742 is jurisdictional leads to a fairer result. However, the Ninth Circuit has considered and rejected this very argument." 817 F. Supp. 829, 832 (N.D. Cal. 1993), *aff'd*, 45 F.3d 436 (9th Cir. 1994). *See also Hall v. Maritime Administration*, Civ. Action 92-3030, 1993 U.S. Dist. Lexis 5753 (E.D. La. 1993) (following Fifth Circuit precedent and concluding "with great reluctance" that plaintiff's complaint must be dismissed). Only this Court can resolve this conflict and mandate a uniform rule for the timely service of process on the United States in suits brought under the SAA.

B. This Court Should Grant the Writ Because the Fifth Circuit's Interpretation of the SAA's Forthwith Service Requirement Frustrates Congressional Intent.

The Fifth Circuit's interpretation of the SAA's forthwith service requirement as substantive, like those of the Second and Eleventh Circuits, fails to capture Congress's intent. Prior to 1916, the government enjoyed immunity from suits alleging damages inflicted by government owned and operated vessels. Recognizing the inequity of declining to compensate those damaged by government vessels, Congress passed the Shipping Act of 1916, later modified in 1920 and renamed the SAA. 39 Stat. 728, 730-31; 46 U.S.C. § 742. The Shipping Act, and the SAA after it, provided that U.S. vessels employed as merchant

vessels would be subject to all laws, regulations and liabilities to which private merchant vessels were subject. *Id.* This provision reveals Congress's consent to suits involving damages inflicted by government vessels and Congress's intent to treat governmental and private vessels equally.

Congress's specific intent in including the forthwith service requirement in the SAA is less clear. In fact, the legislative history of the Act lacks any explanation for the forthwith service requirement. As noted above, some courts have opined that the SAA's forthwith service requirement constitutes an integral part of the government's waiver of sovereign immunity, and that Congress intended that immunity be maintained when service on the government is not forthwith. *E.g., Battaglia*, 303 F.2d at 685; *Kenyon*, 676 F.2d at 1232.

This view of the forthwith requirement stems from the rule of statutory construction that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *McMahon v. United States*, 342 U.S. 25, 27 n.5 (1951). No rule of statutory construction requires, however, that each term within a statute waiving immunity be strictly construed. In fact, this Court has noted that narrowly construing specific terms of such a statute can defeat Congress's general intent to waive immunity. For instance, in *Indian Towing Co. v. United States*, this Court warned against "import[ing] immunity back into a statute designed to limit it." 350 U.S. 61, 69 (1955). Echoing this Court's warning in *Indian Towing*, the court in *Weiss v. United States*, emphasized that a presumption in favor of immunity "does not mean that there must be a niggling and

obnubilative adherence to the narrowest meaning of the words of the Act when the patent intent of Congress" is to waive immunity. 168 F. Supp. 300, 301 (D.N.J. 1958).

Even Justice Friendly, who concurred in an opinion holding that the forthwith requirement constitutes an integral part of the government's waiver of immunity, remarked:

> I should have supposed that, once Congress gave the basic consent to sue the United States, as it did in the first sentence of Sec. 2 of the Suits in Admiralty Act, it was content to have the courts decide the effect of various procedural lapses in the same manner as "if such vessel were privately owned or operated." The Act was "a comprehensive waiver by the United States" whereby "the government, in entering the shipping world as a participant, simply assumes a normal role in the antecedent pattern."

Battaglia, 303 F.2d at 686 (citation omitted) (*quoting* Gilmore and Black, *Admiralty* 773-774 (1957)).

Congress's more likely intent for including the forthwith requirement in the SAA was simply to provide a time frame for service because no external rule regarding the timeliness of service existed when Congress enacted the SAA in 1920. The Federal Rules did not come into effect until 1938 and did not apply to admiralty suits until 1966. *See* 28 U.S.C. § 2072; Amendments to Rules of Civil Procedure for the United States District Courts, reported in 383 U.S. at 1030-31. When the Rules came into effect, Congress expressed in the Rules Enabling Act that all procedural laws in conflict with the new Rules "shall be of no further force or effect." 28 U.S.C. § 2072. Thus, the

Rules supplanted the SAA's forthwith service requirement. This view is reflected by Justice Boochever in his concurrence in *Kenyon*. 676 F.2d at 1231. Specifically, he states:

> [I]f freed from the bounds of stare decisis, I would hold that the service provision of Section 742 [the forthwith requirement] does not constitute an integral part of the substantive waiver of sovereign immunity, but is a mere procedural provision necessary at the time of the statute's enactment, to effectuate that waiver.

Id. at 1232.

The details of service of process are just the type of procedural requirements the Federal Rules of Civil Procedure were designed to supplant. In fact, this Court has previously construed the details of service of process as procedural. In *Hanna v. Plumer*, this Court decided that Rule 4, in allowing substituted service on an executor by leaving the process at his usual place of abode, supplanted a contrary state rule requiring in-hand service upon an executor. 380 U.S. 460 (1965). The rationale behind the decision in *Hanna* was that such details constituted matters of procedure governed by the Federal Rules. *Id*. at 473. Similarly, in resolving a conflict between service provisions found in the Tucker Act, a predecessor of the Federal Tort Claims Act, and Rule 4, the Eastern District of New York determined that the latter governed. *United States v. American Surety Co.*, 25 F. Supp. 700, 702 (E.D.N.Y. 1938). Specifically, the court stated: "It is to be presumed that the Supreme Court considered the problem of whether or not Sections 762 and 763 of 28 U.S.C.A.

[the Tucker Act] were procedural or substantive and concluded that the procedure outlined therein could be altered by the new rules." *Id.*

Concluding that the forthwith service requirement is anything other than procedural seems particularly illogical in light of the other service requirements found in the SAA. Justice Boochever illustrates this point in his concurrence in *Kenyon*:

> Section 742 [of the SAA] specifies even the manner of mailing "by registered mail to the Attorney General of the United States." Certainly that provision is not to be considered as jurisdictional and would be superseded by the Federal Rule provision that states that a copy of the summons and complaint may be sent by "registered or certified mail to the Attorney General of the United States."

676 F.2d at 1232.

Also persuasive in reaching the conclusion that the SAA's forthwith service requirement is merely procedural is the fact that the 1937 notes of the Advisory Committee pertaining to Rule 4 state that the Rule is intended to "provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof." Federal Civil Judicial Procedure and Rules at 22 (West 1995). Additionally, the Advisory Committee listed several federal statutes providing for service on the United States which the Committee believed the Rules superseded. *Id.* at 1252. The SAA did not appear on the list but likely only because the Rules did not then apply to admiralty cases. For these reasons, the more

likely intent of Congress in including the forthwith service requirement in the SAA was merely to provide a procedural guideline in the absence of the Federal Rules. Now that the Federal Rules apply in admiralty suits, they supplant the SAA's contrary forthwith requirement.

Moreover, continuing to allow the government to enjoy the forthwith service requirement, while private owners and operators of vessels are subject to the service requirements set out in Rule 4, defeats Congress's intent in enacting the SAA to place the government on equal terms with private litigants. *See* 46 U.S.C. § 742. In fact, this Court, in interpreting a different provision of the SAA, noted: "Congress has expressly declared that *when sued under the Suits in Admiralty Act the United States is to have its procedural rights determined and governed in the same manner as private parties.*" *United States v. Isthmian S.S. Co.*, 359 U.S. 314, 324 (1959) (emphasis added). The Third Circuit, in deciding that Rule 4 rather than the SAA's forthwith requirement governs the time for service on the United States, similarly relied on Congress's intent in enacting the SAA to treat the United States as a private litigant. *Jones & Laughlin Steel*, 772 F.2d at 64.

C. This Court Should Grant the Writ Because the Fifth Circuit's Interpretation of the SAA's Forthwith Service Requirement Leads to Inconsistent Results.

Application of the forthwith service requirement rather than Rule 4's 120-day requirement leads to inconsistent results because the term "forthwith," in the words of one court is "inherently ambiguous." *O'Halloran*, 817 F.

Supp. at 831. Courts across the country vary widely in their determinations of what is and what is not forthwith service. *E.g., Holmberg*, 19 F.3d at 1065 (holding that service on the United States 106 days following filing suit was not forthwith); *Kenyon*, 676 F.2d at 1231 (holding that service on the United States 60 days after filing suit was not forthwith); *Owens*, 541 F.2d at 1388 (holding that service on the United States 58 days after filing suit was not forthwith); *O'Halloran*, 817 F. Supp. at 831 (holding that service on the United States 77 days after filing suit was not forthwith); *Libby*, 657 F. Supp. at 1253 (holding that service on the United States 21 days after filing suit was forthwith). This bewildering variation among the courts in interpreting the term "forthwith" serves only to confuse litigants.

A panel of the Ninth Circuit, in *Amella*, employed the forthwith service requirement but expressed the opinion that the requirement failed to promote justice. 732 F.2d at 712-13. The court affirmed the dismissal of a case that was not served "forthwith" with these remarks:

> Lawyers unfamiliar with the ways of admiralty or careless on their watch will encounter this statute as a hidden reef that can be a jurisdictional bar to an otherwise meritorious suit. . . . It is a sad case. . . . One of the "problems which a legal system must face is a combination of a due regard for claims of substantial justice with a system of procedure rigid enough to be workable," . . . but Sec. 742 appears to strike the balance too far in favor of formalism, to the detriment of justice. . . . If Congress were to take the statute off the books, we should feel no remorse; but until Congress awakes to action, we are bound by the statutory requirement.

Id. at 712-714 (*quoting* 2 Holdsworth, *A History of English Law* 196 (1909)).

Likewise, the court in *Libby*, when adopting the Third Circuit's holding that Rule 4 supplants the SAA's forthwith requirement stated:

> Adoption of this holding avoids the unnecessary delay and expense of litigation in cases of this type over whether a certain number of days is "forthwith" within the meaning of 46 U.S.C. § 742 [The SAA]. The policies of deciding cases on their merits and fostering judicial economy are better served by the definitive 120 day time limit established by Rule 4(j). . . . [T]his Court can see no reason to judicially maintain [sic] this trap for the unwary.

657 F. Supp. at 1252-53. Only this Court's adoption of Rule 4 in suits under the SAA can end the drastic variations among the lower courts in determining what constitutes forthwith service.

D. This Court Should Grant the Writ Because the Fifth Circuit's Interpretation of the SAA's Forthwith Service Requirement Restricts the District Courts' Power to Extend the Time for Service Under Any Circumstances.

The Fifth Circuit held that the district court's extension of the time for service in this case had no effect because the SAA's forthwith service requirement is jurisdictional in nature. 51 F.3d at 576. In other words, according to the Fifth Circuit, district courts lack the power to

extend the forthwith service requirement under any circumstances. Thus, even an inadvertent failure to serve the United States forthwith cannot be remedied.

Even if the forthwith service requirement applies to suits brought under the SAA, rather than Rule 4, the district courts should maintain the power to extend the time for service in appropriate circumstances. The Fifth Circuit previously addressed an analogous issue in *McCormick v. United States*, 680 F.2d 345 (1982). *McCormick* involved a suit under the SAA brought against the United States after the statutory limitations period had elapsed. The United States argued that because the SAA reflects a waiver of sovereign immunity, the limitations period is jurisdictional in nature and cannot be tolled under any circumstances. *Id.* at 350. The Fifth Circuit rejected the United States' argument, relying heavily on this Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

In addressing the issue of whether a limitations period in a federal statute providing a new cause of action could be tolled, this Court in *American Pipe* concluded:

> [T]he mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

Id. at 559. Heeding *American Pipe*, the Fifth Circuit held in its own decision on the issue:

> We cannot accept the government's position, and the district court's holding, that the SAA limitations provision can never be tolled. We hold that the two-year limitation on suits under the SAA can be tolled under appropriate circumstances where to do so would not defeat the purpose of the provision, which is to encourage those with claims against the United States to present their claims promptly and diligently, and where injustice to the plaintiff would otherwise resul[t]

McCormick, 680 F.2d at 351. Likewise, federal courts should possess the power to extend the forthwith service requirement under the SAA in appropriate circumstances despite the fact that the SAA's forthwith service requirement may be jurisdictional in nature.

In this case, given the difficulties Mr. Henderson faced in serving the United States, the district court considered an extension of time appropriate. The district court's evaluation of the circumstances should be respected even if the forthwith requirement governs the time for service under the SAA. Allowing an extension in appropriate circumstances does not defeat the purpose of prompt service on the United States and protects the plaintiff against injustice when the failure to serve the United States forthwith is inadvertent and dismissal results, as it did here, in a lost cause of action.

CONCLUSION

Petitioner respectfully urges this Court to grant writ in this case and decide that Rule 4's 120-day service requirement supplants the SAA's forthwith service requirement. Alternatively, Petitioner respectfully urges this Court to decide that district courts may extend the time for service provided by the SAA in appropriate circumstances.

Respectfully submitted,

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HENDERSON v. UNITED STATES

No. 94-40697, Summary Calendar.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

51 F.3d 574

May 10, 1995, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Texas. D.C. DOCKET NUMBER 1:93-CV-529. JUDGE Joe J. Fisher.

COUNSEL: ATTORNEYS FOR APPELLANT: JIM S. ADLER, P.C., John Ivey, Houston, TX.

ATTORNEYS FOR APPELLEE: Mike Bradford, USA, Olen Kenneth Dodd, Beaumont, TX. Timothy R. Lord, Atty., David V. Hutchinson, Asst. Dir., Torts Branch Admiralty Sect., U.S. DOJ, Washington, D. C.

JUDGES: Before SMITH, EMILIO M. GARZA and PARKER, Circuit Judges. OPINION: PER CURIAM:

Lloyd Henderson filed a personal injury suit against the United States under the Suits in Admiralty Act (the "SAA"), 46 U.S.C. app. §§ 741-752 (1988), and the Public Vessels Act (the "PVA"), 46 U.S.C. app. §§ 781-790 (1988). Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the district court dismissed Henderson's complaint for lack of subject-matter jurisdiction. Henderson appeals the district court's dismissal, and we affirm.

I

Lloyd Henderson, a merchant mariner, was injured while working aboard a vessel owned and operated by the United States. On April 8, 1993, Henderson filed a personal injury suit against the United States under the SAA and PVA. Forty-seven days later, on May 25, 1993, the Attorney General of the United States received by mail a copy of the complaint. On August 30, 1993, Henderson filed a motion for postponement in the district court, in which he claimed that documents necessary to complete service of process on the government had been lost in the mail. The district court granted Henderson's motion, but ordered that he complete service within fifteen days. The United States Attorney for the district in which the action was brought was personally served with the complaint on September 3, 1993, 148 days after Henderson had filed the suit.

The United States moved to dismiss Henderson's suit for lack of subject-matter jurisdiction, arguing that § 742 of the SAA requires that plaintiffs effect service of process in suits brought against the government under the SAA "forthwith." The district court denied the motion without opinion. The United States subsequently renewed its motion to dismiss, citing United States v. Holmberg, 19 F.3d 1062 (5th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 482, 130 L. Ed. 2d 395 (1994). The district court dismissed Henderson's complaint without prejudice for lack of subject-matter jurisdiction.

Henderson appeals, arguing that (1) the district court granted him an extension of time in which to effect service of process on the Government; (2) given the problems he had with the mail, he completed service of process on the Government reasonably forthwith; (3) his service on the Attorney General was forthwith and satisfied the service requirements of § 742; and (4) the district court's dismissal of his complaint violated his right to due process.[1]

II

Service of process on the United States is accomplished by delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought and by sending a copy of the summons and complaint to the Attorney General of the United States. Fed.R.Civ.P. 4(i)(1) (previous version at Rule 4(d)(4) (1993)); Peters v. United States, 9 F.3d 344, 345 (5th Cir.1993). At the time Henderson filed his suit, service of process in suits brought under the SAA was governed by two separate timeliness requirements. Rule 4(j) of the Federal Rules of Civil Procedure required that a plaintiff effect service within 120 days after filing the suit. Fed.R.Civ.P. 4(j) (1993) (current version at Rule 4(m)).[2]

---

[1] We do not address Henderson's due process claim because the district court dismissed his complaint without prejudice, and Henderson does not argue that a subsequent suit would be time-barred.

[2] At the time Henderson filed his suit, Rule 4(j) read as follows:
If a service of the summons and complaint is not made upon a defendant within 20 days after the filing of the complaint and

Under § 742 of the SAA, however, a plaintiff that has brought suit against the United States under the SAA must effect service of process "forthwith," 46 U.S.C. app. § 742.[3]

We review the district court's dismissal of Henderson's complaint for lack of subject-matter jurisdiction de novo. Shanbaum v. United States, 32 F.3d 180, 182 (5th Cir.1994).

A

Henderson argues that because the district court granted him an extension of time in which to effect service of process on the Government, he was exempt from

---

the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. Fed.R.Civ.P. 4(j) (current version at Rule 4(m)). In 1993, Rule 4(j) was replaced by Rule 4(m), which states that:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. Fed.R.Civ.P. 4(m).

[3] Section 742 states in pertinent part that:

The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service. . . .

§ 742's "forthwith" requirement. Under Rule 4(j), the district court was required to dismiss a plaintiff's complaint for failure to meet the 120-day requirement unless the plaintiff showed "good cause" for its failure. While the district court did not expressly find that Henderson had shown "good cause" for being unable to meet the 120-day requirement, the court did grant him a fifteen-day extension.

In United States v. Holmberg, 19 F.3d 1062 (5th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 482, 130 L. Ed. 2d 395 (1994), we addressed the question of whether the forthwith service requirement in § 742 is procedural and, thus, superseded by the Federal Rules of Civil Procedure. We held that the requirement of forthwith service is a condition of the government's waiver of sovereign immunity and, therefore, a jurisdictional prerequisite. Id. at 1064-65; accord Libby v. United States, 840 F.2d 818 (11th Cir.1988); Amella v. United States, 732 F.2d 711 (9th Cir.1984); Battaglia v. United States, 303 F.2d 683 (2d Cir.), cert. dismissed, 371 U.S. 907, 83 S. Ct. 210, 9 L. Ed. 2d 168 (1962). But see Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62 (3d Cir.1985) (holding forthwith service requirement to be procedural). Because § 742's forthwith service requirement is a jurisdictional prerequisite, it is not superseded by the Federal Rules of Civil Procedure and could not have been modified by Rule 4(j). See Holmberg, 19 F.3d at 1064 (holding that Rule 4(j) does not superseded [sic] § 742's forthwith requirement). Thus, the district court's decision to grant Henderson fifteen additional days in which to meet the forthwith service requirement of Rule 4(j) did not affect either the court's

subject-matter jurisdiction or Henderson's obligations under § 742.

B

Henderson contends next that, given his problems with the mail, he completed service of process on the Government reasonably forthwith, and that the district court's implied finding that he showed "good cause" for the delay in service supports his contention. Henderson also cites as support our statement in United States v. Bradley, 428 F.2d 1013 (5th Cir.1970), that in the context of another statute, the term "forthwith" was "deliberately undefined . . . to allow courts to interpret it in a context of 'reasonableness,' on a case by case basis." Id. at 1015. In Holmberg, however, we concluded that "under any definition, service in 103 or 106 days is not forthwith." Holmberg, 19 F.3d at 1065. Thus, even if we interpret the term in a context of reasonableness, and even if the district court found that Henderson showed good cause for the delay, completing service in 148 days is not forthwith.

C

Lastly, Henderson argues that his service on the Attorney General was forthwith and satisfied the service of process requirements of § 742. He contends that "the purpose of the [forthwith] requirement is to provide reasonably prompt notice of the suit to the United States," and that his service on the Attorney General provided the government with that notice. Under § 742, both service of the complaint on the U.S. Attorney and the mailing of a

copy to the Attorney General are required to complete service of process on the government. See § 742. "The word 'forthwith' applies both to the service of a copy of the complaint on the United States Attorney and to the mailing of a copy of the complaint by registered mail to the Attorney General of the United States." 1 Martin J. Norris, The Law of Maritime Personal Injuries, § 8.4 (4th ed. 1990). See, e.g., Battaglia v. United States, 303 F.2d 683, 686 (2d Cir.), cert. dismissed, 371 U.S. 907, 83 S. Ct. 210, 9 L. Ed. 2d 168 (1962) (holding that the term "forthwith" applies to both the service and the mailing). Thus, while we do not address whether Henderson's service on the Attorney General was forthwith, we conclude that Henderson's service on the Attorney General alone did not satisfy the forthwith service requirement of § 742.

III

For the foregoing reasons, we DENY the Government's motion to dismiss Henderson's appeal,[4] but AFFIRM the district court's dismissal of Henderson's complaint.

---

[4] In a Motion to Dismiss the Appeal as Unmeritorious, the Government moved for dismissal of Henderson's appeal pursuant to Local Rule 42.2, which provides for the dismissal of certain appeals that this Court finds "frivolous and entirely without merit." Although we affirm the district court's dismissal of his complaint, Henderson's appeal was not frivolous.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON	*	
	*	
vs.	*	CIVIL NO. 1:93-CV-529
	*	
UNITED STATES	*	
OF AMERICA	*	

ORDER

Pending before the Court is a motion to dismiss for lack of subject matter jurisdiction filed by the defendant, the United States. The plaintiff filed this case under the Suits in Admiralty Act and affected service on the defendant 150 days later. The United States argues that service was not "forthwith," and therefore, the Court lacks subject matter jurisdiction. The plaintiff has filed a response in opposition.

The forthwith service requirement in section 742 of the Suits in Admiralty Act is jurisdictional. *United States v. Holmberg,* 19 F.3d 1062 (5th Cir. 1994). If service is not "forthwith," the district court lacks the requisite subject matter jurisdiction to entertain the action. *Holmberg,* 19 F.3d at 1064-1065. Although "forthwith" has no precise time line, the Fifth Circuit has held that 103 days is not forthwith. *Holmberg,* 19 F.3d at 1065.

Because the plaintiff affected service on the United States 150 days after filing suit, service was not forthwith. Therefore, this court lacks subject matter jurisdiction, and the case must be dismissed. Accordingly, it is

ORDERED that the United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction is GRANTED, and the plaintiff's claims against the United States, if any, are DISMISSED without prejudice.

SIGNED this 16 day of June, 1994.

/s/ Joe J. Fischer
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 11 1995
OFFICE OF THE CLERK

No. 95-232

In the Supreme Court of the United States

OCTOBER TERM, 1995

LLOYD HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, provides for suits in admiralty against vessels or cargoes of the United States. Section 2 of that Act states that "[t]he libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States." 46 U.S.C. App. 742. The question presented in this case is whether compliance with the requirement that the complaint be served "forthwith" is a jurisdictional condition on the statutory waiver of sovereign immunity.

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In the Supreme Court of the United States

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No. 95-232

LLOYD HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 51 F.3d 574. The order of the district court (Pet. App. 8-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1995. The petition for a writ of certiorari was filed on August 8, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed a seaman's personal injury action against the United States on April 8, 1993, under the Suits in Admiralty Act (SAA), 46 U.S.C. App. 741 *et seq.*, and the Public Vessels Act (PVA), 46 U.S.C. App. 781 *et seq.* Pet. App. 2. Section 2 of the SAA provides, in pertinent part, that "[t]he libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States." 46 U.S.C. App. 742. That requirement is also applicable to petitioner's PVA action, because of the PVA's requirement that suits under that Act "shall be subject to and proceed in accordance with the provisions of" the SAA. 46 U.S.C. App. 782.

On May 25, 1993, 47 days after the filing of petitioner's complaint, the Attorney General received a copy of the complaint by mail. On August 30, 1993, 144 days after filing his complaint, petitioner filed a motion for postponement in the district court, in which he claimed to have been unable to complete service on the appropriate United States Attorney due to difficulties with the mail. The court granted petitioner 15 days to complete service, and the United States Attorney was served on September 3, 1993, 148 days after petitioner filed suit. The United States moved to dismiss the action, arguing that petitioner's failure to effect service of process "forthwith," as required by the SAA, deprived the court of subject-matter jurisdiction. The district court denied the motion without opinion. Pet. App. 2.

After the district court denied the motion, the Fifth Circuit issued its opinion in *United States* v. *Holmberg*, 19 F.3d 1062, cert. denied, 115 S. Ct. 482 (1994). The court in *Holmberg* held that the SAA's waiver of sovereign immunity is conditioned upon the plaintiff's compliance with 46 U.S.C. App. 742. See 19 F.3d at 1064. Because "[c]onditions to a waiver of sovereign immunity are necessarily jurisdictional in nature," *ibid.*, a plaintiff's failure to effect service of a complaint upon the government "forthwith," as required by Section 742, deprives the district court of jurisdiction over his claim, *id.* at 1065. The *Holmberg* court held as well that Section 742 "involves substantive rights because it defines the scope of the Government's consent to be sued," and that its requirements therefore cannot be modified by Federal Rule of Civil Procedure 4(j) (1993). 19 F.3d at 1065.[1] The court "agree[d] that there has been no uniform definition of forthwith" but concluded that, "under any definition, service in 103 or 106 days" would not satisfy the requirements of Section 742. *Ibid.* In light of the Fifth Circuit's decision in *Holmberg*, the district court in the instant case reconsidered its

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[1] At the time petitioner filed his complaint, Rule 4(j) provided as follows:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

In 1993, Rule 4(j) was renumbered 4(m) and was amended in respects not relevant to this case.

ruling and dismissed petitioner's complaint without prejudice for lack of subject-matter jurisdiction. Pet. App. 2.

2. The court of appeals affirmed. Pet. App. 1-7. The court held that, because the requirements of Section 742 are jurisdictional, the district court's decision to grant petitioner a 15-day extension to serve his complaint "did not affect either the court's subject-matter jurisdiction or [petitioner's] obligations under § 742." *Id.* at 5-6. Relying on *Holmberg*, the court held that petitioner, who had served his complaint on the United States Attorney 148 days after it was filed, could not be said to have effected service "forthwith." *Id.* at 6. Finally, the court held that the word "forthwith" in Section 742 "applies both to the service of a copy of the complaint on the United States Attorney and to the mailing of a copy of the complaint by registered mail to the Attorney General of the United States." *Id.* at 7. The court declined, however, to decide whether service of the complaint on the Attorney General (47 days after its filing) had been effected "forthwith," since service upon the Attorney General alone could not suffice to satisfy the requirements of Section 742. *Ibid.*[2]

[2] The court of appeals declined to address petitioner's contention that the dismissal of his complaint violated due process. The court explained that "the district court dismissed his complaint without prejudice, and [petitioner] [did] not argue that a subsequent suit would be time-barred." Pet. App. 3 n.1. Petitioner does not pursue his due process claim in this Court. See Pet. i.

ARGUMENT

1. This Court has held that the terms of consent contained in a statutory waiver of sovereign immunity define a court's jurisdiction, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), and that the Federal Rules of Civil Procedure cannot relax the jurisdictional conditions placed on such a waiver, *United States* v. *Sherwood*, 312 U.S. 584, 589-590 (1941). The court of appeals adhered to that principle in the instant case. The requirement that service of the complaint upon the government be effected "forthwith" is an express statutory condition on the SAA's waiver of sovereign immunity; the Federal Rules of Civil Procedure may "not abridge, enlarge or modify" that condition. 28 U.S.C. 2072(b). See also *Libby* v. *United States*, 840 F.2d 818, 821 (11th Cir. 1988).[3] The court of appeals' decision is in accord with rulings of the Second, Ninth, and Eleventh Circuits, the other circuits that hear the vast majority of admiralty cases and the only other circuits to rule on the question. See, *e.g.*, *Libby*, 840 F.2d at 819-821; *Amella* v. *United States*, 732 F.2d 711, 713 (9th Cir. 1984); *Kenyon* v. *United States*, 676 F.2d 1229, 1231 (9th Cir.

[3] The SAA's waiver of sovereign immunity is in Section 742, as is the requirement that service upon the government be effected "forthwith." The procedural requirements for an action under the SAA, however, are in Section 743. See 46 U.S.C. App. 742 and 743. The structure of the statute supports the conclusion that Section 742 is not simply procedural, but is a substantive provision that former Rule 4(j) could not alter. See, *e.g.*, *Holmberg*, 19 F.3d at 1064-1065; *Libby*, 840 F.2d at 820.

1981); *Battaglia* v. *United States*, 303 F.2d 683, 685-686 (2d Cir.), cert. dismissed, 371 U.S. 907 (1962).[4]

This Court recently denied the petition for certiorari in *Holmberg*, which raised the same question as is presented in the instant case. Contrary to petitioner's submission (see Pet. 6-7), the decision below does not conflict with the Third Circuit's holding in *Jones & Laughlin Steel, Inc.* v. *Mon River Towing, Inc.*, 772 F.2d 62 (3d Cir. 1985). In *Jones & Laughlin Steel*, the Third Circuit held that it lacked jurisdiction under the SAA and that jurisdiction existed only under the Federal Tort Claims Act. *Id.* at 64-65. The court's statement that "the [SAA's] requirement of forthwith service of process is not jurisdictional but rather is procedural," *id.* at 66, was dictum.

Petitioner contends (Pet. 7-9) that the 1966 amendments to the Federal Rules of Civil Procedure, which broadly unified admiralty procedure with the rules of procedure in civil cases, were intended to supplant existing service requirements in admiralty proceedings with a uniform 120-day period provided under the Federal Rules. As a condition of the government's waiver of sovereign immunity, however, Section 742 is a substantive limitation on the courts' jurisdiction that cannot be modified by the Federal Rules of Civil Procedure. *Sherwood*, 312 U.S. at 589-590.

2. Petitioner suggests that the term "forthwith" should be defined as 120 days, the service requirement in Rule 4(j). Pet. 15-17. This Court has held, however, that an undefined term found in a statute should

[4] Petitioner relies (see Pet. 6-7) on earlier district court decisions from within the Fifth and Eleventh Circuits.

be construed in accordance with its ordinary, natural, and plain meaning. *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993); *Caminetti* v. *United States*, 242 U.S. 470, 485-486 (1917). "'Forthwith' connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella*, 732 F.2d at 713, citing *Black's Law Dictionary* 588 (5th ed. 1979); accord *Libby*, 840 F.2d at 821; *City of New York* v. *McAllister Bros.*, 278 F.2d 708, 710 (2d Cir. 1960). Indeed, this Court has determined that "forthwith" "[i]n matters of practice and pleading * * * is usually construed, and sometimes defined by rule of court, as within twenty-four hours." *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 193 (1900). In contrast, former Rule 4(j) "set[] 120 days as a presumption of unreasonable and dilatory delay in service of the complaint in any civil suit." *Amella*, 732 F.2d at 713. The Rule 4 benchmark for unreasonable delay is not an appropriate test for determining whether service has been effected "forthwith." *Holmberg*, 19 F.3d at 1065.

3. Finally, petitioner argues that the Fifth Circuit's interpretation of Section 742 places unwarranted restrictions on the district courts' power to extend the time for service of process. Pet. 17-19. Petitioner notes that this Court has applied equitable tolling rules to federal statutes of limitation, and he asserts that a federal court should similarly possess the power to extend the time for service of process when the court deems it appropriate. The tolling principles applicable to statutes of limitations governing other causes of action, however, are of little relevance in construing the SAA's requirement that service of process be effected "forthwith."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1995

No. 95-232

In The

Supreme Court of the United States

October Term, 1995

LLOYD HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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Certiorari Granted November 22, 1995

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RELEVANT DOCKET ENTRIES

APPEAL TRACK3

U.S. District Court
Texas, Eastern (Beaumont)

CIVIL DOCKET FOR CASE #: 93-CV-529

Henderson v. USA — Filed: 10/25/93
Assigned to: Judge Joe J. Fisher
Demand: $150,000 — Nature of Suit: 340
Lead Docket: None — Jurisdiction: US Defendant
Dkt # in SDTX, Galveston Div: is 93cv186

Cause: 46:741 Shipping

LLOYD HENDERSON
plaintiff

John Kemmerer Ivey
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v.

A TRUE COPY I CERTIFY
DAVID J. MALAND
U.S. DISTRICT COURT
EASTERN DISTRICT, TEXAS

BY /s/ Illegible

defendant	Olen Kenneth Dodd, AUSA [COR LD NTC] US Attorney's Office 350 Magnolia Suite 150 Beaumont, TX 77701 Jefferson 409/839-2538 FTS good
	Timothy R Lord 202/501-6344 [COR LD NTC] US Department of Justice Torts Branch Civil Division

Proceedings include all events.
1:93cv529 Henderson v. USA

10/25/93	1	1	Original file, certified copy of transfer order and docket sheet received from the Galveston Division of the Southern District of Tx cause G-93-186 with 1) complaint 2) order reassigning judge 3) motion for postponement of scheduling conf 4) order granting motion for postponement 5) return 6) USA's motion to transfer case (jel) [Entry date 10/27/93]
		• • •	
11/17/93	3	34	Motion by USA to dismiss. (seal) [Entry date 11/22/93]
11/17/93	4	35	Memorandum by USA in support of [3-1] motion to dismiss (seal) [Entry date 11/22/93]

		• • •	
12/16/93	7	55	Response in opposition by Lloyd Henderson to [3-1] motion to dismiss (jel) [Entry date 12/17/93]
12/16/93	8	57	Memorandum by Lloyd Henderson in support of [7-1] motion response (jel) [Entry date 12/17/93]
12/16/93	9	67	Affidavit of Dagnee McKinney Re: [7-1] motion response (jel) [Entry date 12/17/93] [Edit date 12/17/93]
12/16/93	10	91	Affidavit of Melanie Seagler Re: [7-1] motion response (jel) [Entry date 12/17/93] [Edit date 12/17/93]
		• • •	
1/21/94	13	107	Order denying [3-1] motion to dismiss (signed by Judge Joe J. Fisher) cc: attys on 1/24/94 (csc) [Entry date 01/24/94]
		• • •	
5/13/94	30	142	Motion by USA for judgment on the pleadings, or in the alternative to dismiss for lack of jurisdiction (fxc) [Entry date 05/16/94]
5/26/94	32	147	Response by Lloyd Henderson to [30-1] motion for judgment on the pleadings, [30-2] motion to dismiss for lack of jurisdiction (fxc) [Entry date 05/31/94]
		• • •	

6/17/94	33	189	Order granting [30-2] motion to dismiss for lack of jurisdiction, pltf's claims against the United States, if any, are dismissed w/out prejudice (signed by Judge Joe J. Fisher 6/16/94) cc: parties of record 6/17/94 (fxc)
6/17/94	–		Case closed (fxc)
7/15/94	34	191	Notice of appeal by Lloyd Henderson from the order of dismissal w/o prej entered 6/17/94 Fee Status: paid (notice of appeal and docket sheet sent to Fifth Circuit 7/20/94) cc: attys 7/20/94 (w/transcript order form to atty Adler) (jel) [Entry date 07/19/94] [Edit date 07/27/94]

• • •

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION
	§	NO. G-93-186
UNITED STATES OF AMERICA	§	1:93 CV529
Defendants.	§	

PLAINTIFF'S ORIGINAL COMPLAINT

(Filed Apr. 08, 1993)

TO THE HONORABLE JUDGE AND JURY OF SAID COURT:

COMES NOW, LLOYD HENDERSON, Plaintiff in the above-entitled and numbered cause, complaining of UNITED STATES OF AMERICA, (hereinafter referred to as "Defendant"), and for cause of action would respectfully show unto this Honorable Court and Jury as follows:

I.

Plaintiff LLOYD HENDERSON is a resident citizen of the State of Texas and is an utility steward in the United States Merchant Marine.

Defendant UNITED STATES OF AMERICA is a sovereign which has consented to be sued herein under the Suits in Admiralty Act, 46 U.S.C. secs. 741-752, and the Public Vessels Act, 46 U.S.C. secs 781-790 and pursuant to

Federal Rule of Civil Procedure 4(d)(5) by delivering a copy of the summons and complaint to the United States Attorney for the Southern District at the Lyric Center, 8th Floor, 440 Louisiana, Houston, Texas and to the Honorable William P. Barr, Attorney General of the United States, Department of Justice, Room B-324, 10th Street and Constitution Avenue Northwest, Washington, D.C. 20530.

At all times material hereto, Defendant UNITED STATES OF AMERICA, owned and possessed the M/V S.S. DELMONTE, which was managed, operated and controlled by LYKES BROS. STEAMSHIP CO. in coastwise, intercoastal, and foreign commerce.

II.

Venue is proper in the Southern District of Texas, pursuant to 28 U.S.C. § 1391(a), which states that the claim may be brought where Plaintiff resides. Plaintiff resides within the Southern District of Texas.

III.

It has become necessary to bring this suit by reason of the serious and permanent injuries sustained by Plaintiff, LLOYD HENDERSON, on or about August 27, 1991. On that occasion, Plaintiff was working in the course and scope of his employment for the Defendant, UNITED STATES OF AMERICA, more specifically, as a Merchant Marine for the UNITED STATES OF AMERICA and UNITED STATES DEPARTMENT OF TRANSPORTATION and, by virtue of that employment, he was working on

board a vessel owned and/or operated by Defendant, UNITED STATES OF AMERICA, which was on navigable waters. The Defendant was in the business of doing work for monetary profit with the use of vessels such as the one in which LLOYD HENDERSON was working at the time of his injuries. At the time of the injuries made the basis of this suit, Plaintiff, LLOYD HENDERSON was in the course and scope of his employment aboard the vessel in question.

IV.

By reason of the contractual relationship between Plaintiff LLOYD HENDERSON, as a member of the crew in navigable waters and the Defendant, UNITED STATES OF AMERICA, as employer of him, Plaintiff, LLOYD HENDERSON, is entitled to recover maintenance and cure for such time as he has been and will be either convalescing from his injuries under medical care or reaching his maximum improvement. This suit is therefore also maintained for maintenance and cure for which this Defendant is obligated to Plaintiff, LLOYD HENDERSON.

Defendant, UNITED STATES OF AMERICA has been persistent in failing to furnish maintenance and cure to Plaintiff, LLOYD HENDERSON. Accordingly, Plaintiff herein sues for damages arising from Defendant's failure to pay maintenance and cure.

Additionally, UNITED STATES OF AMERICA's failure to promptly pay maintenance and cure was willful and wanton and in callous and flagrant disregard of Plaintiff's rights. Such conduct on the part of Defendant

UNITED STATES OF AMERICA was intentional, recalcitrant, arbitrary and capricious. Defendant UNITED STATES OF AMERICA has no reasonable excuse for its refusal to provide maintenance and cure and has exhibited laxness in their investigation of Plaintiff's claim. Moreover, Defendant UNITED STATES OF AMERICA has made intentional misrepresentations to Plaintiff regarding his entitlement to maintenance and cure benefits which actions constituted fraud, misrepresentation and conspiracy to commit same. Such fraud and misrepresentation on the part of Defendant UNITED STATES OF AMERICA in conjunction with the wrongful refusal to provide maintenance and cure benefits and their callous disregard for Plaintiff's rights, as set out above, was to such a degree that punitive damages should be assessed and awarded against Defendant, UNITED STATES OF AMERICA, for its intentional acts, as set out above, in failing to provide your Plaintiff with maintenance and cure.

Additionally, because of Defendant UNITED STATES OF AMERICA's wrongful refusal to promptly provide Plaintiff with maintenance and cure benefits, Plaintiff was forced to hire the undersigned counsel in order to recover the maintenance and cure benefits plainly owed Plaintiff and an award of attorney's fees should be assessed against Defendant, UNITED STATES OF AMERICA for its arbitrary and capricious actions, as set out above, in failing to provide Plaintiff with maintenance and cure, which actions forced Plaintiff to hire the undersigned counsel.

V.

This case is instituted under and is controlled to an extent by the terms of what is commonly known as the "Jones Act." Plaintiff, LLOYD HENDERSON, would show that nothing he did or failed to do on the occasion in question caused or in any way contributed to cause his injuries. To the contrary, the occurrence in which Plaintiff was injured and the injuries he sustained were proximately caused by the negligence, as that term is understood in law, of the Defendant, their agents, servants and employees, who were acting in the course and scope of their employment for the Defendant at all material to this action. Plaintiff, LLOYD HENDERSON, was employed by the Defendant, UNITED STATES OF AMERICA, and was injured in the course and scope of his employment while on board the vessel in question. The Defendant, UNITED STATES OF AMERICA, owed to Plaintiff a duty to furnish him a safe place to work and a seaworthy vessel, and as applied to Plaintiff, LLOYD HENDERSON, the Defendant failed in those respects in such unseaworthiness of the vessel in question caused and resulted in the injuries and damages sustained by Plaintiff. These conditions were brought about and caused by the named Defendant.

Additionally, Plaintiff would show that the unseaworthy condition of the vessel in question was the result of the willful violation by Defendant, UNITED STATES OF AMERICA of its duties to furnish and maintain a seaworthy vessel. Accordingly, punitive damages should be assessed against UNITED STATES OF AMERICA for its willful acts and conscious and purposeful disregard of its duty to provide a seaworthy vessel.

VI.

Plaintiff would show that the occurrence in question was proximately caused by the negligence of the Defendant, UNITED STATES OF AMERICA breached its legal duty to Plaintiff and such breach caused damages and injuries to Plaintiff.

Plaintiff would further say that the Defendant, UNITED STATES OF AMERICA had the right of control over the details of the work being performed at the work site in question and the right of control over the work being performed by Plaintiff, LLOYD HENDERSON. Additionally, this Defendant had the right of control and right of supervision of the details of the procedures, equipment, devices, instructions, methods and manner of work being performed and these [sic] Defendant was negligent and are [sic] vicariously liable for failing to use ordinary care in the exercise of his right of control and supervision. Accordingly, this Defendant has liability as a Jones Act employer.

VII.

In the occurrence made the basis of this suit Plaintiff, LLOYD HENDERSON, sustained bodily injuries. By reason of these injuries and damages flowing in law therefrom, this suit is maintained. Because of the nature and severity of the injuries sustained. Plaintiff has sustained physical pain and mental anguish and in reasonable probability will continue to suffer physical pain and mental anguish in the future. At the time of the occurrence made the basis of this suit, Plaintiff was a healthy, able-bodied working man. He has and will suffer physical impairment and disfigurement. Because the occurrence in question,

Plaintiff has sustained very painful and disabling physical injuries that have caused him to sustain a loss of earnings and wage earning capacity in the past and this condition will exist into the future. Because of the nature and severity of the injuries he sustained, Plaintiff, LLOYD HENDERSON, has required medical treatment in the past and in reasonable probability will require other and additional medical treatment in the future. Charges for such medical treatment have been made in the past and those which will in reasonable probability be made in the future, have been and will be reasonable charges made necessary by the occurrence in question.

VIII.

The Defendant's conduct was in reckless disregard of the rights, safety, welfare and property of others. The conduct was based on a conscious disregard which resulted in Plaintiff's injuries. Such heedless and reckless disregard is more than momentary thoughtlessness, inadvertence or misjudgment. Such unconscionable conduct goes beyond ordinary negligence and also constitutes gross negligence, making the Defendant liable not only for the actual damages caused to Plaintiff, but also for punitive and exemplary damages. This gross negligence proximately caused the injuries to Plaintiff.

IX.

Plaintiff would additionally say and show that he is entitled to recovery of pre-judgment interest in accordance with law and equity as part of the damages herein and Plaintiff here and now sues specifically for recovery of pre-judgment interest.

X.

It is yet to early to ascertain the extent of the damages fully sustained by Plaintiff, but they clearly exceed ONE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($150,000.00), and the minimum jurisdictional limits of this Court. Plaintiff specifically reserves the right to amend his pleadings for a certain amount in the future.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to appear and answer herein, that upon final trial and hearing hereof, the Plaintiff recover his damages in accordance with the evidence, that he recover his costs of court herein, that he recover punitive damages, that he recover interest to which he is entitled under the law, both pre-judgment and post-judgment, and for such other and further relief, general and special, legal and equitable, to which he may show himself justly entitled.

Respectfully submitted,

JIM S. ADLER, P.C.

BY: /s/ J. K. Ivey
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State Bar No. 00925000
J. K. IVEY
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ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LLOYD HENDERSON, Plaintiff, VS. UNITED STATES OF AMERICA, Defendant.	§ § § § § § § §	CIVIL ACTION NO. G-93-186 1:93 CV 529

MOTION FOR POSTPONEMENT OF SCHEDULING CONFERENCE

(Filed Aug. 30, 1993)

TO THE HONORABLE SAMUEL B. KENT:

Comes now, LLOYD HENDERSON, and requests a postponement of the scheduling conference and would respectfully show unto the Court as follows:

I.

Plaintiff filed its Original Complaint on April 8, 1993 against the UNITED STATES OF AMERICA, Defendant. On or about May 25, 1993, Counsel for Defendant mailed citations to be served upon the UNITED STATES OF AMERICA to Constable Jack Abercia in Houston, Texas. Constable Jack Abercia's office contacted counsel for Plaintiff's office on June 1, 1993 and stated that two Summons in a Civil Action forms were needed with Court seals. Counsel for Plaintiff requested said forms

from the U. S. District Clerk. Said forms were inadvertently lost in the mail and never reached the offices of Plaintiff's counsel. Plaintiff's counsel again requested these forms on August 18, 1993.

Counsel for Plaintiff is requesting a postponement of the scheduling conference until Defendant, UNITED STATES OF AMERICA, can be served. Counsel for Plaintiff believes that service can be effected within thirty (30) days after receipt of the Summons in a Civil Action forms [sic] with court seals.

WHEREFORE, premises considered, Plaintiff, LLOYD HENDERSON, prays that the Court will postpone the scheduling conference presently set for September 1, 1993 at 9:40 a.m. for a date at least thirty days after Plaintiff has again attempted service upon Defendant, and for such other relief to which Plaintiff may show himself entitled.

Respectfully submitted,

JIM S. ADLER, P.C.

BY: /s/ Jim S. Adler
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ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LLOYD HENDERSON Plaintiff,	§	
VS.	§	CIVIL ACTION
UNITED STATES OF AMERICA	§	NO. G-93-186
Defendant.	§	1:93 CV 529

ORDER

(Filed Sep. 01, 1993)

Before the Court is Plaintiff's Motion for Postponement of Scheduling Conference. The plaintiff asks for a postponement because the defendant has not been served. This case was filed over four months ago, and it is,

ORDERED that the plaintiff serve the defendant, the United States of America, within fifteen days. Further, it is,

ORDERED that Plaintiff's Motion for Postponement of Scheduling Conference is GRANTED. The scheduling conference is reset for 10:00 a.m., November 8, 1993.

Done this the 31st day of August, 1993 at Galveston, Texas.

/s/ Hugh Gibson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON Plaintiff, vs. UNITED STATES OF AMERICA Defendant.	)	C.A. NO. 9-CV-529

UNITED STATES' MOTION TO DISMISS

(Filed Nov. 17, 1993)

The Defendant moves this Court to dismiss the United States pursuant to Rules 12(b)(1) Fed. R. Civ. P. In support of this motion the United States relies upon the pleading, Memorandum Of Law In Support with attachments.

WHEREFORE, the United States prays that this motion to dismiss the United States be granted and the attached Order entered.

Dated: November 15, 1993

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

GAYNELLE GRIFFIN JONES
United States Attorney

/s/ Timothy R. Lord
TIMOTHY R. LORD,
Trial Attorney
Torts Branch, Civil Division
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Washington, D.C. 20044-4271
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON	)	
	)	
Plaintiff,	)	C.A. NO.
vs.	)	9-CV-529
UNITED STATES OF AMERICA	)	
	)	
Defendant.	)	
	)	

DEFENDANT UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

(Filed Nov. 17, 1993)

STATEMENT OF FACTS AND INTRODUCTION

The plaintiff, Lloyd Henderson, claims he suffered injuries on August 29, 1991, while working as a seaman aboard the M/V DELMONTE, a vessel owned by the United States through the Maritime Administration (MarAd) and managed by its' General Agent. On May 29, 1992, the plaintiff filed an administrative claim, as required by the Clarification Act, 50 U.S.C. app. § 1291. Sixty days later, the claim was administratively disallowed by MarAd pursuant to regulations contained in 46 C.F.R. Part 327.7. On April 8, 1993, this suit was filed in the Southern District of Texas against the United States. [*See* attached copy of first page of plaintiff's Complaint]. Time passed. On September 3, 1993, **150 days after filing the Complaint,** the plaintiff's properly effected service upon the United States Attorney. [*See* attached copy of

Summons].[1] Subsequently, the case was transferred to this Court.

This Court's jurisdiction over the plaintiff's claim derives from the Suits in Admiralty Act (SAA), 46 U.S.C. app. §§ 741-752. Pursuant to § 742 of the SAA, the plaintiff's claim against the United States should be dismissed pursuant to Rule 12(b) (1) for failure to affect forthwith service on the United States.

ARGUMENT

I. The Forthwith Service Provision Is A Jurisdictional Prerequisite.

As an initial matter, the burden of establishing subject matter jurisdiction lies with the plaintiff, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); government attorneys have "no power to waive conditions or limitations imposed by statute in respect of suits against the United States," *Munro v. United States*, 303 U.S. 36, 41 (1938) (citation omitted); and the immunity of the United States is not to be waived by a court's policy based determinations, however compelling. *Library Of Congress v. Shaw*, 478 U.S. 310, 321 (1985). It is equally well established that

> [t]he United States, as sovereign, is immune from suit except as it waives its immunity, and the terms of its waiver, as set forth expressly

[1] The Attorney General of the United States was served with process on May 25, 1993.

> and specifically by Congress, define the parameters of a federal court's subject matter jurisdiction to entertain suits brought against it. . . . The conditions that Congress imposes upon its waiver of immunity should be strictly construed.

Ware v. United States, 626 F.2d 1278, 1286 (5th Cir. 1980) (citations omitted); *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *McMahon v. United States*, 342 U.S. 25, 27 (1951).

The SAA was passed in 1920 to resolve the inadequacies and inequities of existing law.[2] *See McCormick v. United States*, 680 F.2d 345, 348 (5th Cir. 1982) (citing *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 178-171 (1976)). As was explained by the Supreme Court, congress intended the SAA to be a comprehensive statute which,

> furnishes a complete system of administration, applying to the United States . . . by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation. . . . [i]t follows that after passage of the [SAA] no libel in admiralty could be maintained against the United States . . . on such causes of action except in accordance with its provisions . . .

[2] *See generally, Authorizing Suits Against the United States in Admiralty, etc., Hearing on H.R. 7124 Before the House Comm. on the Judiciary*, 66th Cong., 1st Sess. (1919); *Suits in Admiralty Against the United States, Hearing on S. 2253 Before Senate Comm. on Commerce*, 66th Cong., 1st Sess. (1919); and Cong. Rec. House at 1679-1680 January 7, 1920.

United States Shipping Board Emergency Fleet Corp. v. Rosenberg Bros. & Co., et al., 276 U.S. 202, 213-214 (1927).[3] The legislative history of the SAA explains the purpose of the forthwith service requirement.

At the time of its enactment, Congress noted the unique nature of admiralty law and was concerned that the SAA reflect the need for prompt and immediate action (forthwith) inherent in admiralty litigation. Ira A. Campbell, Special Assistant to the Attorney General in Admiralty, who helped draft the SAA stated:

> Mr. Campbell. This bill . . . is providing the machinery by which all admiralty litigation can be handled. Here is what you are facing as the results of conditions today. . . . **There is no litigation which requires such prompt and immediate action, if it is properly taken care of, as admiralty litigation**[,] . . . because your witnesses are all sailors, as a rule; your vessels come into the port where sailors disappear and you cannot find them. So it may be that your case will be won or lost upon the one man whom it is impossible to locate. . . . [In]asmuch as Congress is passing these [private] bills constantly, and creating the right of suit in these

[3] In 1925 Congress passed the Public Vessels Act [PVA], 46 U.S.C. App. §§ 781-790 (1988), which extended the United States' waiver of sovereign immunity to include admiralty actions involving public vessels, e.g. naval vessels. The PVA incorporated those provisions of the SAA which are not inconsistent. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 227 (1944). The PVA and the SAA are exclusive and distinct statutes which, together, constitute the United States' waiver of sovereign immunity in admiralty actions. *United Continental Tuna Corp.*, 425 U.S. at 178-182.

> cases, it might be well to consider the advisability of authorizing such litigation, so that the litigation may be taken care of promptly by the Government.

Suits in Admiralty Against the United States, Hearing on S. 2253 Before Senate Comm. on Commerce, 66th Cong., 1st Sess. at 27-28 (1919) (emphasis added); *Merchants National Bank et al. v. The DREDGE GENERAL G.L. GILLESPIE, etc., et al.,* 663 F.2d 1338, 1348 (5th Cir. 1981); *see also Marich v. United States, et al.,* 84 F. Supp. 829, 832 (N.D. Cal. 1949).

Because, the SAA grants the waiver of sovereign immunity to pursue an *in personam* action against the United States in admiralty, with the right to proceed on *in rem* principles, Congress had to adopt a method of process approximating the jurisdictional requirements applicable to both *in rem* and *in personam* actions. Supplemental Rules C(3) and E(4) which govern *in rem* admiralty actions, reflect the need for prompt and immediate (forthwith) service of process and are similar to the Admiralty Rules in effect at the time the SAA was passed. *Merchants National Bank* at 327 n.38. Supplemental Rule E(4) (a) provides in pertinent part: "Upon issuance and delivery of the process . . . the marshal or other person or organization having a warrant **shall forthwith execute the process**. . . . "[4] (emphasis added).

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[4] Prior to a 1985 amendment, which added requirement of judicial scrutiny before the issuance of a warrant for arrest of the vessel, Supplemental Rule C(3) provided:

> Upon the filing of the Complaint the clerk shall **forthwith issue a warrant for the arrest of the vessel** or other property that is the subject of the action and deliver it to the marshall for service.

Consistent with Congress' original intent the SAA requirement that process be issued forthwith reflects the existing law for obtaining *in rem* jurisdiction in private admiralty litigation; i.e. immediately. Congress substituted the forthwith issuance of a warrant of arrest, with the forthwith service of the summons upon the Attorney General and the United States Attorney. As such, it has substance and is an integral part of the United States' maritime waiver of sovereign immunity. As Congressman Volstead stated in the House of Representatives in 1920:

> The bill [which became the SAA] provides that instead of securing jurisdiction by seizure of a ship, suit may be brought by service of summons upon the Attorney General and that upon such service the government shall become liable without an attachment. . . . In lieu of this we provide a remedy by a suit *in personam* against the government.

Cong. Rec. House, at 1680, January 7, 1920. Accordingly, a plaintiff bringing an admiralty action *in personam,* or *in personam* on *in rem* principles against the United States must, as a condition to the right to sue, comply with the forthwith service requirement of the SAA.

II. The Fifth Circuit Has Held That The Forthwith Service Requirement Is Jurisdictional.

The Fifth Circuit in *Kieu v. United States,* 1993 AMC 1789, 1791 (5th Cir. 1992) (per curiam) (not otherwise reported), held that the forthwith service requirement of

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See Advisory Committee Note to 1985 Amendment of Supplemental Rule C(3).

§ 742 of the SAA is jurisdictional. The plaintiffs in *Kieu* sought to relate back their amended complaint to name the United States, not the Department of Energy, as the proper defendant under the SAA. By the time the plaintiffs properly served the amended complaint upon the United States pursuant to the § 742 of the SAA, the two-year statute of limitations had run. 46 U.S.C. app. § 745.

The district court in *Kieu* held that the plaintiffs' original filing against the Department of Energy did not comply with the jurisdictional prerequisites of § 742 and § 745 and, consequently, refused to relate back the amended complaint, dismissing the claim for lack of subject matter jurisdiction. *Ahn Thi Kieu, et al. v. United States Department of Energy,* No. 1: 90 cv 861, (E.D. Tx. May 24, 1991) (Judge Schell) (unpublished opinion) (copy attached).

The *Kieu* panel affirmed holding that service of process in an admiralty action against the United States must comply with the jurisdictional requirements of § 742 of the SAA. *Kieu,* 1993 AMC at 1791 (citing *Amella v. United States,* 732 F. 2d 1229, 1231 (9th Cir. 1981)); *see Watts v. Pinckney,* 752 F.2d 406, 408 (9th Cir. 1985) and *Wish v. United States,* 1979 AMC 2858, 2859 (N.D. Cal. 1979) (same holdings based on similar facts).[5]

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[5] Three of the four other Circuit Courts addressing the issue agree with the Fifth circuit; the SAA forthwith service requirement is jurisdictional. *Battaglia v. United States,* 303 F.2d 683, 685-686 (2d Cir. 1962), *cert. dismissed,* 371 U.S. 907; *Amella,* 732 F.2d at 1231 (9th Cir.); *Libby v. United States,* 840 F.2d 818, 820 (11th Cir. 1988). The only circuit holding otherwise was the Third Circuit in *Jones & Laughlin Steel, Inc. v. Mon River Towing,*

Subsequent to the Fifth Circuit's decision in *Kieu,* Judge Schell again addressed the forthwith service issue. *Landry v. United States, et al.,* 815 F.Supp. 1000, 1003 (1993) (appeal pending). The *Landry* court recognized the precedent set in *Kieu* and upheld the jurisdictional nature of the forthwith service provision, dismissing a claim against the United States for lack of subject matter jurisdiction wherein service was not affected until 110 days. The holding in *Landry* was followed by the United States District Court for the Eastern District of Louisiana in *Michael Hall v. Maritime administration et al.,* No. 92-3020, 1993 WL 139507 at *2, LEXIS 5753 at *2 (E.D. La. April 27, 1993) (not otherwise reported) (service of process at 126 days not forthwith); *but see Holmberg v. OMI Ship Management, Inc.,* No. 92-3749, WL 165774 (E.D. La. May 6, 1993) (not otherwise reported) (appeal pending).

III. Service Of Process Affected After 150 Days Is Not Forthwith.

The plaintiff in this case did not properly serve the United States until 150 days after his complaint was filed. The term "forthwith" is not defined in the SAA. A court is not, however, without guidance as to the meaning of the term. The Supreme Court recently held that "[w]hen a

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Inc., 772 F.2d 62 (3rd Cir. 1983); *accord Estain v. United States,* No. 92-479, 1992 WL 125348 at *2, LEXIS 7946 (E.D. La. June 2, 1992) (decided subsequent to, but not citing *Kieu*) (not otherwise published); *but c.f. Hudson Trading Co. Inc. v. United States,* 28 F.2d 744, 746 (3rd Cir. 1928) ("When consent [by the United States to be sued] has been given, the conditions, upon which [it] has consented to be sued, must be complied with, even though they be purely formal") (citations omitted).

word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *John Angus Smith v. United States*, ___ U.S. ___; 124 L. Ed. 2d 138, ___; 61 U.S.L.W 4503, 4505 (1993); *see Caminetti v. United States*, 242 U.S. 470, 485 (1917) (statutory language should be given its plain meaning); 82 C.J.S. *Statutes* § 329.b (1953 & Supp. 1992). In fact, the Supreme Court defined forthwith "in matters of practice and pleading . . . as usually construed and sometimes defined by rule of court, as within 24 hours." *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 193 (1900).

The ordinary and natural meaning of the forthwith service requirement is that a plaintiff must serve the complaint on the United States at once, as soon as possible, without delay, now, straightaway, immediately, directly, instantly, presently, promptly, and with all reasonable dispatch under the circumstances. *See Black's Law Dictionary* 654 (6th ed. 1990); 37 C.J.S. *Forthwith* § 1 (1953 & Supp. 1992); William P. Statsky, *Legal Thesaurus/Dictionary* 335 (West 1985). Courts interpreting the term "forthwith" have generally done so according to its plain meaning.

The Fifth Circuit said the term forthwith was left

> deliberately undefined, in our view, to allow courts to interpret it in the context of "reasonableness," on a case by case basis. We are convinced that "forthwith" requires no more or less than reasonable promptness, diligence or dispatch . . . , considering the difficulties actually encountered in attempting to perform the task. **The term "forthwith" clearly will not tolerate delay**. . . .

United States v. Bradley, 428 F.2d 1013, 1015-16 (5th Cir. 1970) (discussing the term "forthwith" as it appears in Rule 41, Fed. R. Crim. P. governing the issuance of a warrant for arrest) (footnotes omitted) (emphasis added). The Eleventh Circuit relied on the *Bradley* court's reasonable dispatch, no delay definition of the term "forthwith" and held that service on the 24th day was forthwith pursuant to the SAA. *Libby v. United States*, 840 F.2d 818, 820 (11th Cir. 1988).

The Second Circuit defined the term forthwith contained in § 742 as meaning "immediately, without delay, or as soon as the object may be accomplished by reasonable exertion," and that service made after two months was not forthwith. *City of New York v. McAllister Bros.*, 278 F.2d 708, 710 (2nd Cir. 1960) (adding that even a relaxed interpretation of the term "forthwith" could not permit a delay of two months in service); *Battaglia v. United States*, 303 F.2d 683, 686 (2d Cir. 1962), *cert. dismissed*, 371 U.S. 907 (4½ months is not forthwith).

Courts have no trouble determining what constitutes forthwith service pursuant to § 742. *E.g. Landry*, 815 F.Supp. at 1003 (110 days is not forthwith); *Hall*, 1993 WL 139507 at *2 (126 days is not forthwith); *Amella*, 732 F.2d at 713 (63 days is not forthwith); *Kenyon v. United States*, 676 F.2d 1229, 1231 (9th Cir. 1981) (60 days is not forthwith); *Barrie v. United States*, 615 F.2d 829, 830 (9th Cir. 1980) 62 or 64 days is not forthwith); *Owens v. United States*, 541 F.2d 1386, 1387 (9th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977) (58 days is not forthwith); *Watts*, 752 F.2d at 408 (33 months is not forthwith); *Erdman v. Hudson Waterways Corp., et al.*, 713 F. Supp. 706, 709 (S.D. N.Y. 1989) (80 days is not forthwith); *Pezzola v. United States*,

618 F.Supp. 544, 548 (D.C.N.Y. 1985) (more than one year is not forthwith); *Halperlin v. United States*, 610 F. Supp. 8, 12-13 (S.D. Fla. 1985) (93 days is not forthwith); *O'Halloran v. United States*, 817 F.Supp 829, 833 (N.D. Cal. 1993) (77 days is not forthwith) (appeal pending); *Wish*, 1979 AMC at 2859 (58 days is not forthwith); *Moore v. United States*, 1978 AMC 815, 816 (N.D. Cal.) (90 days is not forthwith); *Smyer v. United States*, 1978 AMC 817, 820 (N.D. Cal.) (98 days is not forthwith); *c.f. Gajewski v. United States*, 540 F. Supp. 381, 384-85 (S.D.N.Y. 1982) (18 days is forthwith).

IV. Forthwith Service Is A Condition Precedent To The Substantive Right To Sue The United States, And Cannot Be Superseded By Rule 4(j) Federal Rules Of Civil Procedure.

The Federal Rules of Civil Procedure were enacted in 1938 and enabled by the Rules Enabling Act of 1934 (1988) which states, in pertinent part: "The Supreme Court shall have the power to prescribe general rules of practice and procedure. . . . Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect . . . " 28 U.S.C. § 2072(a), (b) (1988). *See Hanna v. Plumer*, 380 U.S. 460, 470-71 (1965). Only if deemed "procedural" can a law be superseded by rules promulgated pursuant to the Rules Enabling Act. *See Sibbach v. Wilson*, 312 U.S. 1, 14 (1940) (defining procedure as "the judicial process for enforcing rights and duties recognized by

substantive law"); *c.f. Amella*, 732 F.2d at 713 (the assumption that a Federal Rule of Civil Procedure can amend an act of Congress is dubious).[6]

The Supreme Court in *Sherwood* addressed the effect of the Federal Rules of Civil Procedure upon the United States' waiver of sovereign immunity:

> An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction . . .
>
> . . . The matter is one not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. . . . The jurisdiction [limited by conditions contained in the statute] is unaffected by the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction.

Id. 312 U.S. at 589-90 (quoted in *Libby*, 840 F.2d at 820). Since the forthwith service requirement is not procedural, but is an integral element of the maritime waiver of sovereign immunity granted by the SAA, no procedural rule may supersede the forthwith service provision. *Sibbach*, 312 U.S. at 10 (a court may not restrict the jurisdiction conferred by statute pursuant to the Rules Enabling Act); *see Schlagenhauf v. Holder*, 379 U.S. 104, 113 (1964) (a

---

[6] *C.f.* 28 U.S.C. § 2071, which provides in pertinent part: "The Supreme court . . . may . . . prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress. . . . " (quoted in *Orpen v United States*, 1973 AMC 914 (N.D. Cal.) (the service requirements of § 742 are not superseded by Rule 4, Fed. R. Civ. P.).

rule must regulate procedure, not substantive rights, to be within the scope of the Enabling Act).

Consequently, the forthwith service requirement cannot be superseded by Rule 4(j), or any procedural rule promulgated pursuant to Rules Enabling Act.[7] *Libby*, 840 F.2d at 821; *Amella*, 732 F.2d at 713; *see Messenger v. United States*, 231 F.2d 328, 332 (2d Cir. 1956) (the Federal Rules were not indented to enlarge the substantive jurisdiction of the federal courts); *Sibbach*, 312 U.S. at 10; 2 *Moore's Federal Practice* R1 ¶ 1.05 ("the Rules can never extend the jurisdiction of the court [over the United States]").

---

[7] Rule 4(j) was enacted in 1983. Act of Jan. 12, 1983, Pub.L. No. 97-462, § 2, 96 Stat. 2527 and provides, in pertinent part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

F. R. Civ. P. Prior to Rule 4(j), the Federal Rules did not prescribe a time limit for service of a summons and complaint. If service of process was unreasonably dilatory, a court could dismiss the action pursuant to Rule 41(b), Fed. R. Civ. P. for failure to prosecute. *See Messenger*, 231 F.2d at 329 (original proposal to abate action for failure to serve process by 60th day after filing was dropped). The Advisory Committee Note accompanying Rule 4(j) explains its purpose: "As long as service was performed by marshals such a restriction was not necessary. However, the proposed gradual elimination of marshal service raises new concerns about timeliness." 93 F.R.D. 255, 263.

CONCLUSION

For the foregoing reasons, the district court's order denying the United States' Motion To Dismiss should be reversed. Dated: November 15, 1993

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

GAYNELLE GRIFFIN JONES
United States Attorney

/s/ Timothy R. Lord
TIMOTHY R. LORD,
Trial Attorney
Torts Branch, Civil Division
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P.O. Box 14271
Washington, D.C. 20044-4271
Telephone: (202) 616-4026

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION
UNITED STATES OF AMERICA	§	NO. G-93-186
Defendants.	§	

PLAINTIFF'S ORIGINAL COMPLAINT

(Filed Apr. 8, 1993)

TO THE HONORABLE JUDGE AND JURY OF SAID COURT:

COMES NOW, LLOYD HENDERSON, Plaintiff in the above-entitled and numbered cause, complaining of UNITED STATES OF AMERICA, (hereinafter referred to as "Defendant"), and for cause of action would respectfully show unto this Honorable Court and Jury as follows:

I.

Plaintiff LLOYD HENDESON is a resident citizen of the State of Texas and is an utility steward in the United Stats Merchant Marine.

Defendant UNITED STATES OF AMERICA is a sovereign which has consented to be sued herein under the Suits in Admiralty Act,. 46 U.S.C. secs. 741-752, and the Public Vessels Act, 46 U.S.C. secs 781-790 and pursuant to

* * *

Illegible
Precinct #1, Harris County, Texas
BY /s/ Illegible
Deputy

CIV 1 (Rev. 10/82)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
400 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFFS ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Served U.S. Attorneys' Office
Date Sept. 3, 1993 Time 10:20 Initial SC

CLERK
MICHAEL N. MILBY, CLERK

(BY) DEPUTY CLERK
/s/ Linda Beauchamp

DATE
7-22-93

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ANH THI KIEU, ET AL	*	
VS.	*	
	*	1: 90 CV 861
U.S. DEPARTMENT OF ENERGY	*	

ORDER OF DISMISSAL

(Filed May 24, 1991)

CAME ON TO BE HEARD this day the motion of the defendant, United States of America, to dismiss the plaintiffs' complaint and amended complaint in the above-captioned and numbered cause, and the Court, after considering said motion, the response and the various arguments of counsel, is of the opinion that the motion is meritorious and should be granted.

The facts of the matter are as follows. The plaintiff filed a complaint with the court naming the United States Department of Energy (DOE) as the defendant on October 31, 1990. This complaint has not been served on DOE, the United States Attorney or the Attorney General of the United States. The statute of limitations ran on November 3, 1990, pursuant to the two year limitations provision of the Suits in Admiralty Act (SAA). 46 U.S.C. §§ 741, 745. On November 26th, 1990, the DOE received a notice from the court indicating suit had been filed. DOE called the United States Attorney, who in turn contacted plaintiff's counsel and told plaintiff's counsel that the wrong party had been sued (DOE instead of the United States) and that service needed to be effected on the U.S. Attorney

General and the United States Attorney for the Eastern District of Texas. On December 5th, 1990, the plaintiff filed an amended complaint naming the correct parties which was served on the U.S. Attorney on the same day and on the Attorney General on December 10th, 1990.

The plaintiff argues that under Fed. R. Civ. P. 15(c) the amended complaint should be allowed to relate back to the original complaint, which was filed prior to the expiration of the statute of limitations. The U.S. argues that because the incorrect party was sued in the original complaint and because the correct party was not served before the statute of limitations ran, this court does not have subject matter jurisdiction of the suit and there is nothing for the amended complaint to relate back to under the rule.

The Fifth Circuit has held that statutes which embody the waiver of sovereign immunity are to be strictly construed. *Carr v. Veterans Administration*, 522 F.2d 1355, 1357 (5th Cir. 1976). The SAA requires the United States of America be sued. 46 U.S.C. § 745; *Williams v. U.S.*, 711 F.2d 893, 897-898 (9th Cir. 1983); *Doyle v. Bethlehem Steel Corp.*, 504 F.2d 911, 912-913 (5th Cir. 1974). The SAA further requires service on the Attorney General and the United States Attorney. 46 U.S.C. § 742. In this case, the United States was not served prior to the expiration of the statute of limitations on November 3rd, 1990 (nor was the DOE, even though they were not a proper party). Thus, this court cannot allow the relation back of the amended complaint because there is no valid complaint filed within the statute of limitations to which it may properly relate back. The plaintiffs' argument that the DOE had notice of the plaintiffs' "claims" for over a

year fails to properly apply Fed. R. Civ. P. 15(c), which requires notice of the institution of the "action" against it. Notice of administrative claims is not equivalent to notice that a lawsuit has been filed. *Craig v. U.S.*, 413 F.2d 854, 858 (9th Cir.), *cert. denied*, 396 U.S. 987 (1969); *Holden v. R.J. Reynolds Ind.*, 82 F.D.R.157, 161 (M.D. N.C. 1979). As DOE did not receive notice of the institution of this suit within the limitations period, this argument is unpersuasive.[1]

It is, therefore, **ORDERED** that the motion of the defendant, the United States of America, is **GRANTED**, and the complaint and amended complaint of the plaintiffs are **DISMISSED**.

SO ORDERED.

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[1] Moreover, we note that three circuits have declined to impute knowledge of an agency to the U.S. under circumstances similar to these. *Allgeier v. U.S.*, 909 F.2d 869, 874 (6th Cir. 1990); *Johnston v. U.S. Postal Service*, 861 F.2d 1475, 1481 (10th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 54, 107 L.Ed.2d 23 (1989); *Allen v. Veterans Admin.*, 749 F.2d 1386, 1389 (9th Cir. 1984). While only one Second Circuit district court case has held to the contrary. *Murray v. U.S. Postal Service*, 550 F.Supp. 1211 (D.Mass. 1982). The plaintiff's argument that the Fifth Circuit would follow *Murray* is not entirely persuasive. Nor, do we think that, if presented squarely with this question, the Fifth Circuit would necessarily hold that service to a responsible government official in an agency would impute knowledge of the commencement of an action to the United States on the basis of dicta in *Carr, supra*, especially when Fed. R. Civ. P. 15(c) is considered in conjunction with Fed. R. Civ. P. 4(d)(4). *Edwards v. U.S.*, 755 F.2d 1155 (5th Cir. 1985), is distinguishable because the U.S. Attorney was served within the statute of limitations in that case, so a responsible government official was timely served within the meaning of the note to Fed. R. Civ. P. 15(c).

SIGNED this the 24th day of May, 1991.

/s/ Richard A. Schell
RICHARD A. SCHELL
UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Defendant United States' Motion To Dismiss, Memorandum In Support with attachments and proposed Order were mailed via United States' Mail service on November 16, 1993 to the following counsel of record:

J.K. Ivey, Jim Adler
6161 Savoy, Suite 700
Houston, TX 77036-3397
(713) 953-9400

/s/ Timothy R. Lord
TIMOTHY R. LORD

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION
UNITED STATES OF AMERICA	§	NO. 93-CV-529
Defendants.	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO UNITED STATES OF AMERICA'S MOTION TO DISMISS

(Filed Dec. 16, 1993)

Plaintiff, LLOYD HENDERSON, files this Response in Opposition to the Motion to Dismiss (the "Motion") of Defendant, UNITED STATES OF AMERICA, on the following grounds: 1) Defendant's Motion was not timely filed pursuant to Fed. R. Civ. P. 12(b); 2) the requirement of "forthwith" service has been superseded by Fed. R. Civ. P. 4, *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62 (3rd Cir. 1985); 3) Plaintiff's service was "forthwith," in that Plaintiff affected service with reasonable promptness, diligence and dispatch, *United States v. Bradley*, 428 F.2d 1013, 1015-16 (5th Cir. 1970); and 4) the Hon. Hugh Gibson, a judge of the Southern District of Texas, considered Plaintiff's difficulties in obtaining service and granted a fifteen (15) day extension to obtain service on Defendant on August 31, 1993, thereby impliedly finding "due diligence" and "good cause" existed on Plaintiff's part.

Plaintiff incorporates by references it [sic] Brief in Opposition to the Motion to Dismiss of Defendant, UNITED STATES OF AMERICA, the Affidavit of Dagnee McKinney, the Affidavit of Melanie Seagler, and the Affidavit of J. K. Ivey, filed contemporaneously herewith.

WHEREFORE, Plaintiff prays that Defendant's Motion to Dismiss be, in all things, DENIED.

Dated: December 15, 1993.

Respectfully submitted,

JIM S. ADLER, P.C.
/s/ J. K. Ivey
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ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION
UNITED STATES OF AMERICA	§	NO. 93-CV-529
Defendants.	§	

PLAINTIFF'S BRIEF IN OPPOSITION TO UNITED STATES OF AMERICA'S MOTION TO DISMISS

(Filed Dec. 16, 1993)

Plaintiff, LLOYD HENDERSON, files this Brief in Opposition to the Motion to Dismiss (the "Motion") of Defendant, UNITED STATES OF AMERICA, and would respectfully show as follows:

STATEMENT OF FACTS[1]

Plaintiff was injured on August 29, 1992, while working as a seaman aboard the M/V DELMONTE, a vessel owned by the United States through the Maritime Administration. On May 29, 1992, Plaintiff filed an administrative claim for his injuries, as required by the Clarification Act. 50 U.S.C. § 1291. Sixty days later, the

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[1] The following Statement of Facts includes a summary of the Affidavits of Dagnee McKinney, Melanie Seagler, and J. K. Ivey, which are incorporated herein by reference.

claim was denied. The foregoing is admitted by Defendant.

On April 8, 1993, Plaintiff timely commenced this action against Defendant in the United States District Court for the Southern District of Texas, Galveston Division. Summons forms were not received by Plaintiff's counsel, as requested, with file stamped copies of the Complaint. Summons forms were obtained, completed, and then forwarded to the District Clerk for the Southern District of Texas, Galveston Division, on April 21, 1993. The completed summons were received by Plaintiff's counsel on May 3, 1993.

On May 19, 1993, Plaintiff's Summon and Complaint was sent via certified mail to the United States Attorney General, and received on May 25, 1993.

On May 26, 1993, Plaintiff's Complaint was forwarded for service to Constable Jack Abercia by Plaintiff's counsel, for service on U.S. Attorney for the Southern District of Texas. On June 1, 1993, Constable Jack Abercia's office wrote to Plaintiff's counsel that it required the Court's seal on each summons form prior to serving, and that it needed two additional summons forms.

Plaintiff's counsel again requested, via mail, additional summons forms from the U. S. District Court. When then [sic] were not received, Plaintiff's counsel called the Clerk, and informed the Clerk's office that they were not received. Plaintiff's counsel sent duplicate copies of the summons forms, to replace the ones that were apparently lost in the mail.

Plaintiff's counsel again requested the summons forms from the District Clerk's office on July 19, 1993 and August 18, 1993. Upon receiving the duplicate, file stamped summons, they were transmitted a second time to Constable Abercia's office on August 25, 1993.

On August 31, 1993, Judge Hugh Gibson considered Plaintiff's difficulty in obtaining service, and granted Plaintiff an additional fifteen (15) days to obtain service on the Defendant. Service was obtained on September 3, 1993. In an abundance of caution, a second Complaint was sent to Washington, D.C., on September 3, 1993, for personal service upon Hon. William Barr, Attorney General for the United States of America.

On October 15, 1993, Defendant first appeared herein and filed its Unopposed Motion to Transfer Venue, seeking to transfer this matter to the Eastern District of Texas, Beaumont Division. The Motion to Transfer Venue was granted. On November 15, 1993, Defendant filed its Motion to Dismiss. Defendant asserts that Plaintiff did not "forthwith" obtain service on the United States Attorney, as required by the Suits in Admiralty Act, in that 150 days elapsed between the filing of Plaintiff's Complaint and service on the United States Attorney for the Southern District of Texas. 46 U.S.C. § 742, For the reasons stated below, Defendant's Motion is without merit and should be, in all things, DENIED.

ARGUMENT

I. Defendant's motion was not timely filed pursuant to Fed. R. Civ. P. 12(b).

Defendant first appeared in this action by its Motion to Transfer Venue filed October 15, 1993. Defendant's Rule 12(b) Motion to Dismiss was not filed until November 15, 1993. Plaintiff maintains this did not constitute timely assertion of a Rule 12(b) Motion.

Defendant asserts that its Motion is filed pursuant to Fed. R. Civ. P. 12(b)(1); however, Plaintiff asserts that the Motion would be more properly asserted under Rule 12(b)(2), lack of jurisdiction over the person, or Rule 12(b)(4), insufficiency of service of process.[2] Rule 12(b)(h) provides that a "defense of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived if omitted from a motion in the circumstances described in subdivision (g) . . . "

Thus, as stated by Wright and Miller:

> . . . the message conveyed by the present version of Rule 12(h)(1) seems clear. It advises a litigant to exercise great diligence in challenging personal jurisdiction, venue, or service of process. If he wishes to raise any of these defenses he must do so when he makes his first defensive move . . .

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[2] This is because the "forthwith" provision of 46 U.S.C. § 742 is merely procedural and has been superseded by the enactment of Fed. R. Civ. P. 4(d)(4) and 4(j). *See Jones & Laughlin Steel v. Mon River Towing, Inc.*, 772 F.2d 62 (3rd Cir. 1985), discussed *supra*.

Wright and Miller, Federal Practice & Procedure Civil, Volume 5, 855. The Fifth Circuit has stated that, "it should be equally clear that the failure of a party to object at the first opportunity available to it to raise the question by motion amounts to a waiver of whatever rights the party may have had." *T & R Enterprises, Inc. v. Continental Grain Co.*, 613 F.2d 1272, 1277 (5th Cir. 1980).

In the instant case, Defendant appeared by filing its Motion to Transfer Venue and did not object to personal jurisdiction, or insufficiency of service of process. Accordingly, Defendant has waived such defenses and its Motion to Dismiss should be, in all things, DENIED.

II. The requirement of "forthwith" service has been superseded by Fed. R. Civ. P. 4.

Defendant contends that Plaintiff's service on the United States Attorney for the Southern District of Texas was not "forthwith" as provided by the Suits in Admiralty Act, 42 U.S.C. § 742. *See* Defendant's Brief, pp. 9-10. The question of whether "forthwith" service is a jurisdictional requirement is unsettled in the Fifth Circuit.

The Second, Ninth, and Eleventh Circuits have held that "forthwith" service is jurisdictional. *Batttaglia* [sic] *v. United States*, 303 F.2d 683 (2nd Cir.), cert. dismissed, 371 U.S. 907 (1962), *Amella v. United States*, 732 F.2d 711 (9th Cir. 1984), *Libby v. United States*, 840 F.2d 818 (11th Cir. 1988). The Third Circuit, however, has held that the "forthwith" provision is merely procedural, and was

supplanted by Fed. R. Civ. P. 4. *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62 (3rd Cir. 1985).[3]

The Fifth Circuit has not addressed the issue. The case relied upon by Defendant, *Kieu v. United States*, 1993 AMC 1789 (5th Cir. 1992) (not otherwise reported), dealt with an entirely different issue. In *Kieu*, the Plaintiff **failed to name the United States as defendant** in a Suits in Admiralty action until **after** the two year statute of limitations had expired. *Id.* The case was decided on the basis that the Plaintiff's amended pleadings could not "relate back" to the original statute of limitations date. A careful review of the district court's order of dismissal, attached to Defendant's Brief, confirms this. *Kieu v. United States Department of Energy*, No. 90-CV-861, slip. op. (E.D. Tex. May 24, 1991) (Schell, J.) ("this court cannot allow the relation back of the amended complaint because there is no valid complaint filed within the statute of limitations to which it may properly relate back").

The holding of *Jones & Laughlin* has found favor with district courts of the Fifth Circuit. *See Estrain v. United States*, No. 92-479, 1992 U.S. Dist. LEXIS 7946 (E.D. La. June 2, 1992) (decided after *Kieu*); *Diversified Marine Int'l, Inc. v. United States*, 774 F.Supp. 1005, 1008 (E.D. La. 1991) ("this Court agrees the Third Circuit has adopted the better position"); *Farnsworth v. Sea-Land Service, Inc.*, No. 87-5954, 1989 U.S. Dist. LEXIS 2270 (E.D. La. March 7, 1989); *Phillips v. United States Army Corps of Engineers*, 629 F.Supp. 967 (S.D. Miss. 1986). *Contra Landry v. United*

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[3] 28 U.S.C. § 2072 states that "[a]ll laws in conflict with (the Federal Rules of Civil Procedure) shall be of no further force or effect after such rules have taken effect."

States, 815 F.Supp. 1000 (E.D. Tex. 1993) (Schell, J.) (appeal pending).

As discussed below, there can be no doubt that Plaintiff's service was timely, particularly in light of Judge Gibson's ruling of August 31, 1993. Under the holding of *Jones & Laughlin*, the procedural provisions of the Suits in Admiralty Act have been complied with by Plaintiff, and Defendant's Motion is groundless. Accordingly, Defendant's Motion to Dismiss should be, in all things, DENIED.

III. Plaintiff's service was "forthwith," in that Plaintiff affected service with reasonable promptness, diligence and dispatch.

Even if "forthwith" service is jurisdictional, and it is not, Defendant's motion ignores that Plaintiff did affect service in a "forthwith" manner. As stated by the Fifth Circuit, **"(t)he word 'forthwith' is deliberately undefined, in our view, to allow courts to interpret it in the context of 'reasonableness,' on a case-by-case basis.** We are convinced that 'forthwith' requires no more or less than reasonable promptness, diligence or dispatch." *United States v. Bradley*, 428 F.2d 1013, 1015-16 (5th Cir. 1970) (emphasis supplied).

In the instant case, summons were requested the same instant that suit was filed. *See* Affidavits of Dagnee McKinney, Melanie Seagler, and J. K. Ivey. The Summons was forwarded for service upon receipt of the same from the District Clerk for the Southern District of Texas. *Id.* The Constable returned the Summons once and lost it once. The matter was reviewed by Judge Gibson, who

granted Plaintiff a fifteen (15) day extension to complete service.

Plaintiff attempted to perfect service in April, May, June, July, and August, 1993. Unlike cases cited by Defendant where no efforts were made to obtain service, or an incorrect party was named as Defendant, Plaintiff has exercised reasonable promptness, diligence, and dispatch. *Bradley*, 428 F.2d at 1016. There is no evidence before the Court that Plaintiff has engaged in any delay of his own making. Accordingly, Defendant's Motion to Dismiss should be, in all things, DENIED.

IV. Judge Gibson has already impliedly found "due diligence" and "good cause" on Plaintiff's part.

As noted above, the law of the case is that "due diligence" has been exercised by Plaintiff. On August 31, 1993, the Hon. Hugh Gibson, a judge of the Southern District of Texas, Galveston Division, considered Plaintiff's difficulties in obtaining service, and granted Plaintiff a fifteen (15) day extension from the initial scheduling conference to obtain service on the United States Attorney's office. It is inconsistent to hold that service was not "forthwith," when another judge has found "good cause" to grant a fifteen (15) day extension to obtain service. Accordingly, Defendant's Motion to Dismiss should be, in all things, DENIED.

CONCLUSION

"Equity abhors forfeiture," is well established principle of the law for good cause. Plaintiff has sustained

serious injuries that will go unredressed if Defendant's Motion is granted.

Plaintiff contends that "forthwith" service is procedural, not substantive, as numerous district courts of the Fifth Circuit have agreed. Even if "forthwith" service is jurisdictional, this court has latitude to decide on a "case-by-case" basis if "forthwith" service has been obtained. In this case, Plaintiff made persistent, repeated efforts to obtain service that were only delayed by the United States District Clerk's and the Harris County Constable's offices. This is not a matter to be decided by a form brief such as the one filed by Defendant,[4] but by careful analysis of the facts.

For the foregoing reasons, Defendant's Motion to Dismiss should be, in all things, DENIED.

Dated: December 15, 1993.

Respectfully submitted,

JIM S. ADLER, P.C.
/s/ J. I. Ivey
JIM S. ADLER
TBC 00925000
J. K. IVEY
TBC 10428250
6161 Savoy, Suite 700
Houston, Texas 77036
(713) 953-9400
FAX (713) 953-9550

ATTORNEYS FOR PLAINTIFF

---

[4] Defendant's Brief concludes, "the district court's order denying the United States' Motion to dismiss should be reversed," indicating that at least one other court has rejected Defendant's specious argument.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been duly served upon all counsel in compliance with Fed. R. Civ. P. 5, on this the 15th day of DEC., 1993.

/s/ J. K. Ivey
JIM S. ADLER
J. K. IVEY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LLOYD HENDERSON, Plaintiff,	§	CIVIL ACTION
VS.	§	NO. G-93-186
UNITED STATES OF AMERICA Defendants.	§	

AFFIDAVIT OF DAGNEE MCKINNEY

(Filed Dec. 16, 1993)

STATE OF TEXAS
KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF HARRIS

Before me the undersigned Notary Public on this day personally appeared Dagnee McKinney, who is known by me, and who first being duly sworn by me deposed and stated as follows:

My name is Dagnee McKinney. I am a paralegal in the law firm of Jim S. Adler, P.C. I am over eighteen years of age, have never been convicted of a felony, and am fully competent to make this affidavit. Each of the statements contained herein are true and correct and within my personal knowledge.

On April 8, 1993 we filed Plaintiff's Original Complaint. *See* attached *Exhibit "A"*. We did not receive completed Summons in a Civil Action forms (as requested) with the summons and on April 21, 1993, we sent summons forms for issuance of summons for U.S. defendants to the U.S. District Clerk.We received these forms in our

office on May 4, 1993. *See* true copies of summons forms attached as *Exhibit "B"*. On May 19, 1993, Plaintiff's Complaint was sent via certified mail to the United States Attorney General. It was received on May 25, 1993.

On May 25, 1993, we forwarded Plaintiff's Original Complaint for service to Constable Jack Abercia for service on U.S. Attorney for the Southern District of Texas. *See* copy of letter attached as *Exhibit "C"*. On June 1, 1993, Constable Jack Abercia's office informed us that they needed the Court's seal on each summons form prior to serving and they needed two additional summons forms. *See* letter from Constable Abercia's office attached as *Exhibit "D"*.

We again requested via mail additional summons forms from the U.S. District Court on July 19, 1993. *See* letter to District Clerk attached as *Exhibit "E"*. We did not initially receive the summons dated July 22, 1993. When we did not receive these summons forms. I personally called the Clerk (Carol) and informed her that we did not receive them. We then sent another letter requesting summons forms on August 19, 1993 to replace the ones that were apparently lost in the mail. *See* copy of August 19, 1993 letter attached as *Exhibit "F"*. On August 25, 1993, we received the duplicate, file stamped summons signed July 22, 1993 in our office. *See* a copy of the summons form attached as *Exhibit "G"*. Upon receiving the duplicate, file stamped summons with court seals, they were transmitted a second time to Constable Abercia's office on August 25, 1993. *See* letter to Constable Abercia's office attached as *Exhibit "H"*.

Prior to the scheduled status conference, I informed the Court Clerk that we were having difficulty beyond our control in obtaining service upon said defendants. On August 31, 1993, Judge Hugh Gibson granted us a fifteen (15) day extension to have U.S. of America served. To the best of my knowledge. Defendant was served on September 3, 1993, within the fifteen (15) days granted by the judge. A second Complaint was sent to Washington, D.C. on September 3, 1993, for personal service upon Hon. William Barr, Attorney General for the United States of America. *See* letter dated September 3, 1993, along with a copy of the executed summon [sic] on Defendant, attached as *Exhibit "I"*.

The exhibits attached hereto as *"A," "B," "C," "D", "E", "F", "G", "H", and "I"* were copied from the files maintained by the law firm of Jim S. Adler, P.C., in connection with the above entitled and numbered cause at my direction. I have compared each exhibit with the original from the file, and the same are true and correct copies.

Further, affiant sayeth not."

/s/ Dagnee McKinney
DAGNEE MCKINNEY

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary Public on this 15 day of December, 1993, to certify which witness my hand and seal of office.
[SEAL]

/s/ Angie Thibodeaux
NOTARY PUBLIC in and
for the State of Texas
My commission expires
11-25-95

CIV 1 (Rev. 10/82) **EXHIBIT "B"**

SUMMONS IN A CIVIL ACTION
UNITED STATES DISTRICT COURT
LLOYD HENDERSON
v.
UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
400 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFFS ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within forty-five (45) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK
MICHAEL N. MILBY, CLERK

(BY) DEPUTY CLERK
/s/ Illegible

DATE
5/3/93

EXHIBIT "C"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J.K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

May 25, 1993

Constable Jack F. Abercia
301 San Jacinto, #310
Houston, Texas 77002

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Mr. Abercia:

Enclosed please find the summons along with Plaintiff's Original Complaint for service on Defendant United States of America, c/o the United States Attorney for the Southern District, 400 Louisiana, 8th Floor, Houston, Texas 77002, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return

to our offices for forwarding to the United States District Clerk for the Southern District of Texas, Galveston Division for filing among the papers in this cause.

Our firm check in the amount of $45.00 is enclosed to cover your fees for this service. For our records, please acknowledge receipt of the enclosed documents by affixing your stamp to the enclosed copy of this letter and returning same to the undersigned.

Thank you for your attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
J. K. Ivey

JKI/ms
Enclosure

EXHIBIT "D"

[SEAL]
JACK F. ABERCIA, CONSTABLE
PRECINCT NUMBER ONE
HARRIS COUNTY, TEXAS

MAIN OFFICE
P.O. BOX 52578
HOUSTON, TEXAS
77052-2578
(713) 755-5200 FAX
(713) 755-8951

ANNEX OFFICE
7300 NORTH SHEPHERD
HOUSTON, TEXAS 77091
(713) 697-3600
FAX (713) 697-3649

JUNE 1, 1993

JIM S. ADLER, P.C.
6161 SAVOY STE. 700
HOUSTON, TX. 77036-3397

RE: G93186 LLOYD HENDERSON VS. UNITED STATES OF AMERICA

Dear Sir:

Your Civil Process is being returned for the following reasons:

___ Need $45.00 service fee (for each defendant, Company or Return of Service)

___ Need $50.00 service fee for all Writs

___ Your check is not signed

___ No Additional fee required

___ Unable to locate street address in the Harris County Key map

___ We need a complete physical address in order to serve defendant by personal service or a letter stating to serve defendant by Certified Mail

___ No service address

___ Your paper has expired – need a redate

___ Your paper needs a Texas Certified Seal

___ Please state the name of the person you want served with this corporation or Company

X Other We will need 2 summons both with court seals.

See attached!

REMARKS

Returning check #028569 in the amount of $45.00

/s/. Jackie Stelle
Deputy Clerk, Foreign Desk

EXHIBIT "E"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J.K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

July 19, 1993

Michael Milby, District Clerk
United States District Court
for the Southern District of Texas
Galveston Division
601 Rosenberg, Room 411
Galveston, Texas 77550

Re: Lloyd Henderson v. United States of America, United States Dept. of Transportation, Lykes Bros., Inc. and Lykes Bros. Steamship Co., Inc. U.S. District Court for the Southern District of Texas Galveston Division
Our File No. D91-668

Dear Sir:

Enclosed please find three (3) Summons in a Civil Action forms. The constable's office requests the court's seal on these summons prior to serving the citations.

Please stamp with seals accordingly and return to this office for further handling.

Thank you for your assistance in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
J. K. Ivey

JDI/dbm
Enclosures

CIV 1 (Rev. 10/82)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
400 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK
(BY) DEPUTY CLERK
DATE

EXHIBIT "F"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J.K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

August 19, 1993

Michael Milby, District Clerk
United States District Court
for the Southern District of Texas
ATTN: Carol
Galveston Division
601 Rosenberg, Room 411
Galveston, Texas 77550

Re: Civil Action No. G-93-186; Lloyd Henderson v. United States of America, United States Dept. of Transportation, Lykes Bros., Inc. and Lykes Bros. Steamship Co., Inc. U.S. District Court for the Southern District of Texas, Galveston Division
Our File No. D91-668

Dear Carol:

Enclosed please find four (4) Summons in a Civil Action forms. Please stamp with seals accordingly and return to this office for further handling.

Thank you for your assistance in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey/ETJ
J. K. Ivey

JKI/dbm
Enclosures

CIV 1 (Rev. 10/82)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
400 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK
(BY) DEPUTY CLERK
DATE

CIV 1 (Rev. 10/82) **EXHIBIT "G"**

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
400 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK
MICHAEL N. MILBY, CLERK

(BY) DEPUTY CLERK
/s/ Linda Beauchamp

DATE
7-22-93

EXHIBIT "H"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J.K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

August 25, 1993

Constable Jack F. Abercia
301 San Jacinto, #310
Houston, Texas 77002

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Mr. Abercia:

Per your request dated June 1, 1993, enclosed please find the summons along with Plaintiff's Original Complaint for service on Defendant United States of America, c/o the United States Attorney for the Southern District, 400 Louisiana, 8th Floor, Houston, Texas 77002, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return to our offices for forwarding to the United States District Clerk for the Southern District of Texas, Galveston Division for filing among the papers in this cause.

Our firm check in the amount of $45.00 is enclosed to cover your fees for this service. For our records, please acknowledge receipt of the enclosed documents by affixing your stamp to the enclosed copy of this letter and returning same to the undersigned.

Thank you for your attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey

JKI/ms
Enclosure

EXHIBIT "I"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J.K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

September 3, 1993

VIA HAND DELIVERY

PROFESSIONAL CIVIL PROCESS
3730 Kirby
Houston, Texas 77098

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Sirs:

Enclosed please find a summons along with Plaintiff's Original Complaint for personal service on the United States of America, c/o Hon. William Barr, Atty. General for the U.S. Dept. of Justice Room B-324, 10th Street and Constitution Avenue., N.W., Washington, D.C. 20530, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return to our offices for forwarding to the District Clerk of the Court for filing among the papers in this cause.

Thank you for your prompt attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey by ms
J. K. Ivey

JKI/ms
Enclosure

CIV 1 (Rev. 10/82)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
c/o UNITED STATES ATTY FOR THE
SOUTHERN DISTRICT
440 LOUISIANA, 8TH FLOOR
HOUSTON, TEXAS 77002

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P.C., 6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within forty-five (45) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CONSTABLE PRECINCT #1
Houston, Harris County, Texas
ATTEMPTED SERVICE

DATE	TIME	REMARKS
9/3	10:20 AM	Shirley Carl

CLERK
MICHAEL N. MILBY, CLERK

(BY) DEPUTY CLERK
/s/ Illegible

DATE
5/3/93

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 1:93CV529
UNITED STATES OF AMERICA, Defendants.	§	

AFFIDAVIT OF MELANIE SEAGLER

(Filed Dec. 16, 1993)

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me the undersigned Notary Public on this day personally appeared Melanie Seagler, who is known by me, and who first being duly sworn by me deposed and stated as follows:

My name is Melanie Seagler. I am a legal secretary with the law firm of Jim S. Adler, P.C. I am over eighteen years of age, have never been convicted of a felony, and am fully competent to make this affidavit. Each of the statements contained herein are true and correct and within my personal knowledge.

On May 25, 1993, I forwarded Plaintiff's Original Complaint for service to Constable Jack Abercia for service on U.S. Attorney for the Southern District of Galveston. See Exhibit "A". On June 1, 1993, Constable Jack Abercia's office informed our office that they needed the

court's seal on each summons form prior to serving. See Exhibit "B". Dee, from our office requested additional summons forms from the U.S. District Court. Through much delay on the Court's part, the summons forms were not received in our office until late August. Immediately upon receiving the summons forms, on August 25, 1993, I sent the summons and complaint again to Abercia's office. See Exhibit "C".

On August 31, 1993, Judge Hugh Gibson granted us a fifteen day extension to have the United States of America served. I forwarded the summons along with Plaintiff's Original Complaint to Proffesional [sic] Civil Process on September 3, 1993. See Exhibit "C". The United States of America was served through the Hon. William Barr on September 9, 1993. See Exhibit "E".

The exhibits attached hereto as "A", "B", "C", "D", and "E" were copied from the files maintained by the law firm of Jim S. Adler, P.C., in connection with the above entitled and numbered cause at my direction. I have compared each exhibit with the original from the file, and the same are true and correct copies.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ Melanie Seagler
MELANIE SEAGLER

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary Public on this 15th day of December, 1993, to certify which witness my hand and seal of office.

(SEAL)
ANGIE THIBODAUX
MY COMMISSION
EXPIRES
November 25, 1995

/s/ Angie Thibodaux
NOTARY PUBLIC
in and for the
State of Texas
My commission
expires 11-25-95

EXHIBIT "A"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J. K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

May 25, 1993

Constable Jack F. Abercia
301 San Jacinto, #310
Houston, Texas 77002

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Mr. Abercia:

Enclosed please find the summons along with Plaintiff's Original Complaint for service on Defendant United States of America, c/o the United States Attorney for the Southern District, 400 Louisiana, 8th Floor, Houston, Texas 77002, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return

to our offices for forwarding to the United States District Clerk for the Southern District of Texas, Galveston Division for filing among the papers in this cause.

Our firm check in the amount of $45.00 is enclosed to cover your fees for this service. For our records, please acknowledge receipt of the enclosed documents by affixing your stamp to the enclosed copy of this letter and returning same to the undersigned.

Thank you for your attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
J. K. Ivey

JKI/ms
Enclosure

EXHIBIT "B"

(SEAL) JACK F. ABERCIA, CONSTABLE

PRECINCT NUMBER ONE
HARRIS COUNTY, TEXAS

MAIN OFFICE
P.O. BOX 52578
HOUSTON, TEXAS
77052-2578
(713) 755-5200
FAX (713) 755-8951

ANNEX OFFICE
7300 NORTH SHEPHERD
HOUSTON, TEXAS 77091
(713) 697-3600
FAX (713) 697-3649

JUNE 1, 1993

JIM S. ADLER P.C.
6161 Savoy Ste. 700
HOUSTON, TX. 77036-3397

RE: G93186 LLOYD HENDERSON VS. UNITED STATES OF AMERICA

Dear Sir:

Your Civil Process is being returned for the following reasons:

_ Need $45.00 service fee (for each defendant, Company or Return of Service)

_ Need $50.00 service fee for all Writs

_ Your check is not signed

_ No Additional fee required

_ Unable to locate street address in the Harris County Key map

_ We need a complete physical address in order to serve defendant by personal service or a letter stating to serve defendant by Certified Mail

_ No service address

_ Your paper has expired – need a redate

_ Your paper needs a Texas Certified Seal

_ Please state the name of the person you want served with this corporation or Company

X Other

WE WILL NEED 2 SUMMONS
BOTH WITH COURT SEALS. See attached!

REMARKS

RETURNING CHECK #028569 IN THE AMOUNT OF $45.00

Jackie Stelle
Deputy Clerk, Foreign Desk

EXHIBIT "C"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J. K. IVEY
GREGG O. OBERG
RICHARD J. PLEZIA

FIRST INTERSTATE TOWER
1445 ROSS AVENUE, SUITE 4400
DALLAS, TEXAS 75202-2887
(214) 855-7777
(800) 683-3529
FAX (214) 855-7055

August 25, 1993

FILE
CORRESPONDENCE

Constable Jack F. Abercia
301 San Jacinto, #310
Houston, Texas 77002

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Mr. Abercia:

Per your request dated June 1, 1993, enclosed please find the summons along with Plaintiff's Original Complaint for service on Defendant United States of America, c/o the United States Attorney for the Southern District, 400 Louisiana, 8th Floor, Houston, Texas 77002, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return to our offices for forwarding to the United States District Clerk for the Southern District of Texas, Galveston Division for filing among the papers in this cause.

Our firm check in the amount of $45.00 is enclosed to cover your fees for this service. For our records, please acknowledge receipt of the enclosed documents by affixing your stamp to the enclosed copy of this letter and returning same to the undersigned.

Thank you for your attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
J. K. Ivey

JKI/ms
Enclosure

EXHIBIT "D"

JIM S. ADLER
ATTORNEYS AT LAW
FIRST INTERSTATE TOWER
6161 SAVOY, SUITE 700
HOUSTON, TEXAS 77036-3397
(713) 953-9400
(800) 683-8383
FAX (713) 953-9550

JIM S. ADLER
ERIC T. FUREY
J. K. IVEY
GREGG O. OBERG
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September 3, 1993

VIA HAND DELIVERY

PROFESSIONAL CIVIL PROCESS
3730 Kirby
Houston, Texas 77098

Re: Cause No. G-93-186; Lloyd Henderson v. United States of America; In the United States District Court for the Southern District of Texas, Galveston Division.
Our File No.: D91-668

Dear Sirs:

Enclosed please find the summons along with Plaintiff's Original Complaint for personal service on the United States of America, c/o Hon. William Barr, Atty. General for the U.S. Dept. of Justice Room B-324, 10th Street and Constitution Avenue., N.W., Washington, D.C. 20530, in the above-styled and numbered cause.

When service has been obtained, please return the original citation along with the completed officer's return to our offices for forwarding to the District Clerk of the Court for filing among the papers in this cause.

Thank you for your prompt attention and cooperation in this matter.

Very truly yours,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
J. K. Ivey

by ms

JKI/ms
Enclosure

EXHIBIT "E"

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF TEXAS

CASE NO. G-93-186

LLOYD HENDERSON

VS.

UNITED STATES OF AMERICA

AFFIDAVIT OF SERVICE BY SPECIAL PROCESS SERVER

I, DAVID E KIRLIN, having been duly authorized to make the service of the process in the above entitled case, hereby depose and say:

That I am not a party to or otherwise interested in this suit. That my age and date of birth are as follows: 52, May 19, 1941. That my business address is 306 H STREET NE, WASHINGTON D C 20002

That at 01:30 p.m. on September 9, 1993, I served the within named DEFENDANT\UNITED STATES OF AMERICA SERVE: ATTORNEY GENERAL OF THE UNITED STATES by leaving a copy of the

SUMMONS IN A CIVIL ACTION AND PLAINTIFF'S ORIGINAL COMPLAINT at the DEFENDANT'S usual place of employment US DEPT OF JUSTICE; 10TH & CONSTITUTION AVENUE NW, WASHINGTON, DC with TEREASA NELSON.

That such person is the CLERK, AUTHORIZED TO ACCEPT SERVICE of the within named.

That Affiant describes, to the best of his ability, such person as follows:

Female Black Skin Black Hair

Approximately: 28 Yrs. 5 Ft., 05 In. 150 Lbs.

Washington, the District of Columbia

Subscribed and Sworn to before me this

13 day of Sept. , 1993

/s/ David E Kirlin
DAVID E KIRLIN

/s/ Illegible

My commission Expires: 8/30/94/

CIV 1 (Rev. 10/82)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT

LLOYD HENDERSON

v.

UNITED STATES OF AMERICA

DISTRICT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO.
G-93-186

TO: (NAME AND ADDRESS OF DEFENDANT)
UNITED STATES OF AMERICA
C/O HON. WILLIAM BARR
ATTY. GENERAL FOR THE U.S. DEPT. OF JUSTICE
ROOM B-324
10TH STREET AND CONSTITUTION AVENUE., N.W.
WASHINGTON, D. C. 20530

YOU ARE HEREBY SUMMONED
and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)
J. K. IVEY, JIM S. ADLER, P. C., 6161 SAVOY, SUITE 700,
HOUSTON, TEXAS 77036

an answer to the complaint which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK
MICHAEL N. MILBY, CLERK

(BY) DEPUTY CLERK
/s/ Illegible

DATE
Aug. 25, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON	)	
Plaintiff,	)	
vs.	)	C.A. No. 9-CV-529
UNITED STATES OF AMERICA	)	
Defendant.	)	

UNITED STATES' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, RENEWED MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.

(Filed May 13, 1994)

The Defendant moves this Court to dismiss the United States pursuant to Rule 12(b)(1) Fed. R. Civ. P. In support of this motion the United States relies upon the pleadings and Memorandum Of Law In Support.

WHEREFORE, the United States prays that this motion to dismiss the United States be granted and the attached Order entered.

Dated: May 12, 1994

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

GAYNELLE GRIFFIN JONES
United States Attorney

/s/ Timothy R. Lord
TIMOTHY R. LORD, Trial Attorney
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P.O. Box 14271
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON	)	
Plaintiff,	)	
vs.	)	C.A. No. 9-CV-529
UNITED STATES OF AMERICA	)	
Defendant.	)	

DEFENDANT UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

STATEMENT OF FACTS AND INTRODUCTION

The plaintiff, Lloyd Henderson, claims he suffered injuries while working as a seaman aboard a vessel owned by the United States. His claim is enforceable pursuant to the Suits in Admiralty Act (SAA), 46 U.S.C. app. §§ 741-752. On April 8, 1993, the plaintiff filed suit in the Southern District of Texas. On September 3, 1993, 150 days after filing the complaint, the plaintiff properly effected service upon the United States. Subsequently, the case was transferred to this Court.

On January 21, 1994, this Court denied the United States' motion to dismiss for lack of subject matter jurisdiction for failure to effect "forthwith" service as required by § 742 of the SAA. The trial date, however, was extended pending issuance of a controlling decision from the Fifth Circuit concerning forthwith service. *United States v. Holmberg*, Appeal No. 3468, (Fifth Cir. May 2,

1994). According to the holding in that case, this action should be dismissed for lack of subject matter jurisdiction.

ARGUMENT

The Plaintiff's Action Should Be Dismissed Pursuant To Fifth Circuit Precedent In Holmberg.

In *Holmberg*, the plaintiff failed to effect service of process until 106 days after filing his complaint. Like the instant case, the United States moved to dismiss pursuant to Rule 12(b)(1) for failure to serve forthwith. The district court in *Holmberg* denied the motion but certified the question of whether the forthwith service provision was superseded by Rule 4(J), Fed. R. Civ. P. *Holmberg v. OMI Ship Management, Inc.*, No. 92-3749, WL 165774 (E.D. La. May 6, 1993).

On appeal, the Fifth Circuit held that the forthwith service requirement of the SAA is a jurisdictional prerequisite to sue the United States which was not modified by Rule 4(J). While the *Holmberg* court did not define (in terms of days) what constituted forthwith service, the court concluded "that under any definition, service in 103 or 106 days is not forthwith." *Holmberg* at 3835. The court summarily rejected the plaintiff's argument that the holding in *Holmberg* should not have retroactive effect, then reversed the district court's decision and remanded with instructions to dismiss for lack of subject matter jurisdiction. *Id.*

In the instant case, Henderson effected proper service upon the United States at 150 Days. The *Holmberg* court held that the forthwith service provision of the SAA is

jurisdictional and service at 103 days is not forthwith. In fact, the court referred favorably to circuit court decisions holding that service after 60 days is not forthwith. *Id.* (citing *Amella v. United States*, 303 F.2d 711 (9th Cir. 1984); *City of New York v. McAllister Bros, Inc.*, 278 F.2d 708, 710 (2d cir. 1960)). According to Fifth Circuit precedent as established in *Holmberg*, the plaintiff's service of process at 150 days does not comply with the forthwith service requirement contained in § 742 of the SAA and, therefore, the complaint should be dismissed.

CONCLUSION

For the foregoing reasons, the plaintiff's complaint should be dismissed for lack of subject matter jurisdiction. Rule 12(b)(1), Fed. R. Civ. P.

Dated: May 12, 1994

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

GAYNELLE GRIFFIN JONES
United States Attorney

/s/ Timothy R. Lord
TIMOTHY R. LORD, Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 14271
Washington, D.C. 20044-4271
Telephone: (202) 616-4026

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Defendant United States' Motion For Judgement [sic] On The Pleadings Or, In The Alternative, Renewed Motion To Dismiss For Lack Of Subject Matter Jurisdiction, Memorandum In Support and proposed Order has been mailed pre-paid postage on May 12, 1994 to the following counsel of record:

J.K. Ivey, Jim Adler
6161 Savoy, Suite 700
Houston, TX 77036-3397
(713) 953-9400

/s/ Timothy R. Lord
TIMOTHY R. LORD

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON, Plaintiff,	§	
VS.	§	CIVIL ACTION
UNITED STATES OF AMERICA Defendants.	§	NO. 93-CV-529

PLAINTIFF'S RESPONSE IN OPPOSITION TO UNITED STATES OF AMERICA'S MOTION FOR JUDGMENT ON PLEADINGS OR MOTION TO DISMISS

(Filed May 26, 1994)

Plaintiff, LLOYD HENDERSON, files this Response in Opposition to the Motion for Judgment on the Pleadings or, In the Alternative, Renewed Motion to Dismiss for Lack of Jurisdiction (the "Motion") of Defendant, UNITED STATES OF AMERICA, and would respectfully show as follows:

STATEMENT OF FACTS[1]

Plaintiff was injured on August 29, 1992, while working as a seaman aboard the M/V DELMONTE, a vessel owned by the United States through the Maritime

[1] The following Statement of Facts includes a summary of the Affidavits of Dagnee McKinney, Melanie Seagler, and J. K. Ivey, originally filed December 16, 1993, which are incorporated herein by reference.

Administration. On May 29, 1992, Plaintiff filed an administrative claim for his injuries, as required by the Clarification Act. 50 U.S.C. § 1291. Sixty days later, the claim was denied. The foregoing is admitted by Defendant.

On April 8, 1993, Plaintiff timely commenced this action against Defendant in the United States District Court for the Southern District of Texas, Galveston Division. Summons forms were not received by Plaintiff's counsel, as requested, with file stamped copies of the Complaint. Summons forms were obtained, completed, and then forwarded to the District Clerk for the Souther [sic] District of Texas, Galveston Division, on April 21, 1993. The completed summons were received by Plaintiff's counsel on May 3, 1993.

On May 19, 1993, Plaintiff's Summon and Complaint was sent via certified mail to the United States Attorney General, and received on May 25, 1993.

On May 26, 1993, Plaintiff's Complaint was forwarded for service to Constable Jack Abercia by Plaintiff's counsel, for service on U.S. Attorney for the Southern District of Texas. On June 1, 1993, Constable Jack Abercia's office wrote to Plaintiff's counsel that it required the Court's seal on **each** summons form prior to serving, and that it needed two additional summons forms.

Plaintiff's counsel again requested, via mail, additional summons forms from the U. S. District Court. When then [sic] were not received, Plaintiff's counsel called the Clerk, and informed the Clerk's office that they were not received. Plaintiff's counsel sent duplicate

copies of the summons forms, to replace the ones that were apparently lost in the mail.

Plaintiff's counsel again requested the summons forms from the District Clerk's office on July 19, 1993 and August 18, 1993. Upon receiving the duplicate, file stamped summons, they were transmitted a second time to Constable Abercia's office on August 25, 1993.

On August 31, 1993, Judge Hugh Gibson considered Plaintiff's difficulty in obtaining service, and granted Plaintiff an additional fifteen (15) days to obtain service on the Defendant. Service was obtained on September 3, 1993. In an abundance of caution, a second Complaint was sent to Washington, D.C., on September 3, 1993, for personal service upon Hon. William Barr, Attorney General for the United States of America.

On October 15, 1993, Defendant first appeared herein and filed its Unopposed Motion to Transfer Venue, seeking to transfer this matter to the Eastern District of Texas, Beaumont Division. The Motion to Transfer Venue was granted. On November 15, 1993, Defendant filed its first Motion to Dismiss. Defendant asserted, as now, that Plaintiff did not "forthwith" obtain service on the United States Attorney, as required by the Suits in Admiralty Act, in that 150 days elapsed between the filing of Plaintiff's Complaint and service on the United States Attorney for the Southern District of Texas. 46 U.S.C. § 742. **The Motion was denied by this Court on January 21, 1994.** For the reasons stated below, Defendant's Motion is still without merit and should again be, in all things, DENIED.

ARGUMENT

I. Plaintiff's service was "forthwith," in that Plaintiff affected service with reasonable promptness, diligence and dispatch.

Defendant's Motion presents, for the third time, its time worn argument that "forthwith" service is jurisdictional. *See* Order denying Motion to Dismiss dated January 21, 1994. Defendant's motion ignores that Plaintiff did affect service in a "forthwith" manner. As stated by the Fifth Circuit, **"(t)he word 'forthwith' is deliberately undefined, in our view, to allow courts to interpret it in the context of 'reasonableness,' on a case-by-case basis.** We are convinced that 'forthwith' requires no more or less than reasonable promptness, diligence or dispatch." *United States v. Bradley*, 428 F.2d 1013, 1015-16 (5th Cir. 1970) (emphasis supplied); *See United States v. Holmberg*, 19 F.3rd 1062 (5th Cir. 1994) (same).

In the instant case, summons were requested the same instant that suit was filed. *See* Affidavits of Dagnee McKinney, Melanie Seagler, and J. K. Ivey. The Summons was forwarded for service upon receipt of the same from the District Clerk for the Southern District of Texas. *Id.* The Constable returned the Summons once and lost it once. The matter was reviewed by Judge Gibson, who granted Plaintiff a fifteen (15) day extension to complete service.

Plaintiff attempted to perfect service in April, May, June, July, and August, 1993. Unlike cases cited by Defendant where no efforts were made to obtain service, or an incorrect party was named as Defendant, Plaintiff has exercised reasonable promptness, diligence, and dispatch.

Bradley, 428 F.2d at 1016. There is no evidence before the Court that Plaintiff has engaged in any delay of his own making. Accordingly, Defendant's Motion to Dismiss should be, in all things, DENIED.

II. Judge Gibson and this Court have already found "due diligence" and "good cause" on Plaintiff's part.

As noted above, the law of the case is that "due diligence" has been exercised by Plaintiff. On August 31, 1993, the Hon. Hugh Gibson, a judge of the Southern District of Texas, Galveston Division, considered Plaintiff's difficulties in obtaining service, and granted Plaintiff a fifteen (15) day extension from the initial scheduling conference to obtain service on the United States Attorney's office. It is inconsistent to hold that service was not "forthwith," when another judge has found "good cause" to grant a fifteen (15) day extension to obtain service.

Defendant's Motion reasserts the exact same arguments set forth in it [sic] Motion to Dismiss filed November 15, 1993. The Motion has already been denied by the Court by order dated January 21, 1994. Accordingly, Defendant's Motion to Dismiss should again be, in all things, DENIED.

CONCLUSION

"Equity abhors forfeiture," is well established principle of the law for good cause. Plaintiff has sustained serious injuries that will go unredressed if Defendant's Motion is granted.

Plaintiff contends that this Court has latitude to decide on a "case-by-case" basis if "forthwith" service has been obtained. In this case, Plaintiff made persistent, repeated efforts to obtain service that were only delayed by the United States District Clerk's and the Harris County Constable's offices.

For the foregoing reasons, Defendant's Motion to Dismiss should be, in all things, DENIED.

Dated: May 20, 1993.

Respectfully submitted,

JIM S. ADLER, P.C.

/s/ J. K. Ivey
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been duly served upon all counsel in compliance with Fed. R. Civ. P. 5, on this the 26TH day of MAY, 1994.

/s/ J. K. IVEY
JIM S. ADLER
J. K. IVEY

(3)

Supreme Court, U.S.
FILED
JAN 16 1996
CLERK

No. 95-232

In The

Supreme Court of the United States

October Term, 1995

LLOYD HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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54 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the 120-day service requirement of Federal Rule of Civil Procedure 4 supplants the forthwith service requirement found in the Suits in Admiralty Act ("SAA").

II. If the 120-day service requirement of Rule 4 does not supplant the forthwith service requirement found in the SAA, whether district courts may extend the time for service provided by the SAA under appropriate circumstances.

LIST OF PARTIES

Petitioner:

LLOYD HENDERSON
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Respondent:

UNITED STATES OF AMERICA
C/O SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

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Grammenos v. C.M. Lemos, 457 F.2d 1067 (2d Cir. 1971) 34

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Indian Towing Co. v. United States, 350 U.S. 61 (1955) 21

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Keene Corp. v. U.S., 700 F.2d 836 (2d Cir. 1983), *cert. denied*, 464 U.S. 864 (1984) 25

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McCormick v. United States, 680 F.2d 345 (5th Cir. 1982) 38, 39

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Owens v. United States, 541 F.2d 1386 (9th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).. 11, 13, 23, 34

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Preiser v. Rodriguez, 411 U.S. 475 (1973) 33

Sherwood v. United States, 112 F.2d 587 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 584 (1941) 27

Schram v. Koppin, 35 F. Supp. 313 (E.D. Mich. 1940) 27

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 29

Stanga v. McCormick Shipping Corp., 268 F.2d 544 (5th Cir. 1959) 34

United States v. American Surety Co., 25 F. Supp. 700 (E.D.N.Y. 1938) 28

United States v. Holmberg, 19 F.3d 1062 (5th Cir. 1994), *cert. denied*, 115 S.Ct 482 (1994) 6, 7, 12, 14, 23, 34

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58 CONG. REC., 66th Cong., 1st Sess. 7317-7318, 7439-7440 (1919) 18

59 CONG. REC., 66th Cong., 2d Sess. 1692-1693, 1750-1759, 3350-3351, 3629-3631, 3690-3691 (1920) 18

78 CONG. REC. 9362-63, 10,866 (1934) 29

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H. DOC. 460, 75th Cong., 3d Sess. (1938) 22

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H.R. REP. NO. 1829, 73d Cong., 2d Sess. (1934) 29

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REFERENCE TO THE OPINIONS OF THE COURTS BELOW

Court of Appeals Opinion: 51 F.3d 574 (5th Cir. 1995) – Reproduced in Appendix to Petition for Writ of Certiorari

District Court Order: Reproduced in Appendix to Petition for Writ of Certiorari

STATEMENT OF JURISDICTION

The Fifth Circuit rendered its opinion on May 10, 1995. Petitioner did not file a motion for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioner timely filed his petition for writ of certiorari on August 8, 1995 which was granted by this Court on November 22, 1995.

STATUTORY PROVISIONS INVOLVED

Suits in Admiralty Act, 46 U.S.C. § 742

Libel in personam.

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding in personam may be brought against the United States or against any corporation mentioned in section 1 of this Act. Such suits shall be brought in the district court of the United States for the district in

which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

Rules Enabling Act, 28 U.S.C. § 2072

Rules of procedure and evidence; power to prescribe.

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Fed. R. Civ. P. 4(d)(4) and (5)[1]

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

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[1] These subsections were amended in 1993 and renumbered as Rule 4(i).

Fed. R. Civ. P. 4(j)[2]

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

STATEMENT OF THE CASE

Petitioner Lloyd Henderson sustained injuries on August 27, 1991, while employed by the United States as a seaman aboard the M/V DELMONTE, a ship owned by the United States (R. 3-4). After exhausting administrative remedies, he filed suit against the United States on April 8, 1993, in the United States District Court for the Southern District of Texas, Galveston Division (R. 2, App. 5-12).[3] The court had jurisdiction under the Suits in Admiralty Act ("SAA"), 46 U.S.C. § 741-752 and the Public Vessels Act, 46 U.S.C. §§ 781-790.

From the onset, Mr. Henderson experienced a series of difficulties obtaining the proper summons for the United States from the district clerk's office (R. 163). At the same time Mr. Henderson filed his complaint, he

[2] The 1993 amendments reworded this subsection and renumbered it as Rule 4(m).

[3] On motion by the United States, the case was later transferred to the Eastern District of Texas, Beaumont Division (R. 1).

requested the appropriate summons forms and file stamped copies of the complaint (App. 42, 51). However, these summons forms were not sent to Mr. Henderson's counsel, as requested, with the file stamped copies of the complaint (App. 42, 51). The forms were eventually obtained on April 21, 1993, completed by Mr. Henderson's counsel and immediately forwarded to the District Clerk for the Southern District of Texas, Galveston Division (App. 42, 51). Mr. Henderson's counsel finally received the completed summons from the district court on May 4, 1993 (App. 42, 51-52, 54). He sent the summons and complaint via certified mail to the United States Attorney General on May 19, 1993 (R. 163, App. 42). The Attorney General was served on May 25, 1993 (App. 42, 52).

On May 25, 1993, Mr. Henderson's complaint was forwarded to Constable Jack Abercia for service on the U.S. Attorney for the Southern District of Texas (App. 52, 55-56). The summons intended for the United States Attorney, however, was still not in proper form at that point because the deputy district clerk had failed inadvertently to place the seal of the court on the summons. On June 1, 1993, Constable Jack Abercia's office wrote to Mr. Henderson's counsel and informed him that Abercia required the Court's seal on each summons form prior to service (App. 52, 57-58). The constable's office also advised Mr. Henderson's counsel that it needed two additional summons forms (App. 57-58).

Mr. Henderson's counsel again requested, via mail, additional summons forms from the U.S. District Court with the appropriate court seal (App. 52, 59-61). When they were not received, Mr. Henderson's counsel's office

called the Clerk, and informed the Clerk's office of the situation (App. 52).

Mr. Henderson's counsel again requested by mail the summons forms from the District Clerk's office on August 19, 1993 (App. 52, 62-64). The properly sealed summons were not received until August 25, 1993 (App. 52), although they were dated July 22, 1993 (App. 52, 65). The sealed summons were then transmitted a second time to Constable Abercia's office on August 25, 1993 (App. 52, 66-67), two days before the statute of limitations elapsed. (R. 164).

On August 30, 1993, Mr. Henderson filed a motion seeking an extension of time in which to serve the United States Attorney (R. 12-13, App. 13-14). The district court, after presumably finding good cause as required by Rule 4, granted the extension and rendered an order allowing service on or before September 15, 1993 (R. 16, App. 15). The United States Attorney received personal service on September 3, 1993 (App. 33-34).

On November 17, 1993, the United States moved to dismiss the case for want of jurisdiction due to a lack of "forthwith" service as required by the SAA (R. 34, App. 16-38). Mr. Henderson filed his response to the motion on December 16, 1993 (App. 39-85). The district court originally denied the motion, presumably finding that Rule 4 governed the time for service in the case and that the court had the power to grant an extension (R. 107).

Following the court's ruling, however, the Fifth Circuit delivered its opinion in *United States v. Holmberg*, holding that the SAA's forthwith requirement rather than Rule 4 governs the time for service on the United States.

19 F.3d 1062 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 482 (1994). On May 13, 1994, the government filed a second motion to dismiss based upon the *Holmberg* decision (App. 86-91). The district court reconsidered its ruling in light of *Holmberg* and granted the government's motion to dismiss (R. 189, Pet. App. 8). Although the dismissal was without prejudice, the statute of limitations had already elapsed (R. 189).

Mr. Henderson appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the dismissal, merely reiterating its opinion in *Holmberg* that the SAA's forthwith requirement rather than Rule 4 governs the time for service on the United States (Pet. App. 1). On August 8, 1995, Mr. Henderson filed his Petition for Writ of Certiorari in this Court. This Court granted the Petition on November 22, 1995.

SUMMARY OF THE ARGUMENT

The intent of Congress in enacting the SAA and Rule 4 of the Federal Rules of Civil Procedure compels the conclusion that the 120 day service requirement in Rule 4 supplants the "forthwith" service requirement of the SAA. The inherent conflict between the service provisions in the SAA and Rule 4 has inevitably led to a divergence of opinion among the circuit courts. The Third Circuit has held that Rule 4's 120 day service requirement supersedes the SAA's "forthwith" service provision because it is simply procedural; on the other hand, other circuits have

held that the SAA's "forthwith" requirement represents a waiver of the government's sovereign immunity and cannot be modified by Rule 4 because it is substantive. However, those circuits that have held this provision to be substantive have erroneously based their holdings upon Second Circuit authority decided before 1966 when Congress specifically applied the federal rules of civil procedure to admiralty suits. Additionally, these courts have ignored the fact that at the time the SAA was enacted in 1920, there were no uniform rules in effect governing federal procedure.

Any decision that the forthwith service provision of the SAA is substantive emasculates the intent of the legislature in enacting the SAA. The SAA was enacted by Congress in order to waive its immunity from suit by allowing *in personam* actions against the United States. The SAA specifically provides that suits brought under the Act "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice . . . in like cases between private parties." 46 U.S.C. § 743. Congress even broadened its waiver of sovereign immunity in 1960 by removing the restriction as to merchant vessels. Furthermore, similar statutes in which the government has waived immunity such as the Federal Tort Claims Act and the Tucker Act are also governed by Rule 4 service procedures. The view that the SAA's "forthwith" service requirement is substantive in essence defeats Congress's intent to waive immunity.

The Rules Enabling Act through which the rules of procedure are promulgated specifically states that all conflicting laws "shall be of no further force or effect." 28 U.S.C. § 2072. Congress therefore intended a valid rule

such as Rule 4 to supersede an inconsistent federal statute. This Court has previously held in *Hanna v. Plumer*, 380 U.S. 460 (1965), that Rule 4 which allows service on an executor supplanted a contrary state rule requiring in-hand service because matters of service are governed by the federal rules. Congressional intent to supercede the "forthwith" requirement of the SAA is further evidenced by the fact that present Rule 4 which includes the 120 day service requirement and "good cause" exception was drafted by Congress and not by this Court. Obviously, Congress desired to bring uniformity to the timeliness of service issue.

The inevitable result of the Fifth and other circuits' adoption of the "forthwith" service requirement rather than the 120 days provided by Rule 4 is a drastic variation among the circuits as to what constitutes "forthwith." This Court's determination that the Rule 4 service provisions supplant the "forthwith" service requirement of the SAA would resolve this inconsistency and give effect to legislative intent. The lack of uniformity among the courts concerning the amount of time which is "forthwith" also raises due process concerns since many litigants are denied the right to proceed to trial on the merits. Furthermore, the "forthwith" requirement creates equal protection problems since all other federal actions involving the United States are subject to Rule .. Certainly, Congress did not intend that only seamen should be subjected to this draconian requirement while allowing those injured upon the land to have the advantage of the bright-line time limit in Rule 4.

The Fifth Circuit's interpretation of the SAA's service requirement also incorrectly restricts the district court's

power to extend the time for service under any circumstances. Even if the "forthwith" service requirement applies to suits brought under the SAA rather than Rule 4, the district court should maintain the power to extend the time for service in appropriate circumstances. In an analogous context, this Court has permitted federal courts to toll the limitations period in a federal statute providing for substantive liability. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 556-559 (1974). The facts of this particular case further illustrate the need for a definitive rule which would allow the courts to extend the time period for service under the SAA. Given the problems Mr. Henderson confronted in attempting to serve the United States, the district court's extension of time for serving the government was proper and should be honored by this Court.

ARGUMENT AND AUTHORITIES

I. The 120 Day Service Requirement Of Rule 4 Supplants The Forthwith Service Requirement In The SAA.

A. The Fifth Circuit's Interpretation Of The SAA's Forthwith Service Requirement Conflicts With Third Circuit Precedent.

The manner of service on the United States under the SAA and Rule 4 is essentially the same. Both require that the plaintiff personally serve the United States Attorney

for the district in which the suit is filed[4] and, additionally, serve the Attorney General by mail.[5] Rule 4 and the SAA collide, however, with respect to the time for service on the United States. The SAA fails to provide any specific time for such service, but simply provides that service be "forthwith." Rule 4, on the other hand, provides a specific time limit of 120 days in which to accomplish service and permits the district court to extend the time upon a showing of "good cause."

The confusion regarding the time for service on the United States in suits brought under the SAA has resulted in a divergence in opinion among the circuit courts. The Third Circuit has determined that Rule 4's 120-day requirement supersedes the SAA's forthwith requirement. *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 66 (3d Cir. 1985). Several district courts have held likewise. *E.g., Libby v. United States*, 657 F. Supp. 1251, 1252 (M.D. Fla. 1987); *Phillips v. United States Army Corps of Engineers*, 629 F. Supp. 967, 971 (S.D. Miss. 1986). In contrast, the Second, Fifth, Ninth, and Eleventh Circuits have concluded that the SAA's forthwith requirement applies regardless of Rule 4's 120-day requirement. *E.g. City of New York v. McAllister Brothers, Inc.*, 278 F.2d 708, 710 (2d Cir. 1960); *Owens v. United States*, 541 F.2d 1386, 1388 (9th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977);

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[4] After the filing of this suit, Congress amended Rule 4 to permit the United States Attorney to designate agents to receive process and to permit service on the United States Attorney by mail.

[5] The SAA specifies registered mail; Rule 4 permits registered or certified mail.

Holmberg, 19 F.3d at 1065; *Libby v. United States*, 840 F.2d 818, 820 (11th Cir. 1988).

For the most part, the conflict arises from the determination of whether the SAA's service requirement is substantive or simply procedural. Those courts that consider the forthwith requirement substantive hold that it applies without regard to Rule 4 because the Federal Rules of Civil Procedure do not modify substantive rights. *E.g.*, *Battaglia*, 303 F.2d at 686; 28 U.S.C. § 2072. Those courts that consider the forthwith service requirement procedural hold that Rule 4's 120-day requirement supplants the SAA's forthwith requirement because the Federal Rules supplant all conflicting procedural requirements in federal courts. *E.g.*, *Jones & Laughlin Steel*, 772 F.2d at 66.

The Second Circuit in *City of New York v. McAllister Brothers*, *supra*, was the first court to consider the issue. In that case, the plaintiff served process on the United States Attorney more than two months after filing suit. 278 F.2d at 708. The court held that the plaintiff's failure to comply with the SAA's "forthwith" service requirement deprived the district court of jurisdiction and compelled dismissal. *Id.* at 710. The court reasoned that litigants must strictly comply with technical requirements for service of process upon the government when it has waived sovereign immunity.

Two years later, in *Battaglia v. United States*, the Second Circuit reached an equally harsh result. 303 F.2d 683, 686 (2d Cir. 1962), *cert. dism'd*, 371 U.S. 907 (1962). There, the plaintiff served the United States Attorney on the same day he filed the complaint. The plaintiff failed to

serve the Attorney General by registered mail, however, until approximately four months later. The court construed the SAA to require both forthwith service on the United States Attorney and forthwith service by registered mail on the Attorney General. Accordingly, the court held that the lack of forthwith service warranted dismissal. *Id.* at 686. The rationale for the decision was that the forthwith service requirement constitutes a prerequisite to the United States' waiver of sovereign immunity. *Id.* at 685.

However, in a concurring opinion in *Battaglia*, Justice Friendly strongly criticized the majority opinion. *Id.* at 686-87. Justice Friendly expressed his belief that Congress did not intend this provision of the SAA to be considered jurisdictional; he also believed that Congress intended for the courts to treat the government as in cases involving private party litigants, since the Act was a comprehensive waiver by the United States of sovereign immunity. *Id.* at 686. Nonetheless, Justice Friendly felt compelled to concur in the majority opinion because he "perceiv[ed] no indication of dissatisfaction with the course of decision by [his] brothers sufficient to warrant requesting consideration *in banc*." *Id.* at 687.

The Ninth Circuit blindly followed the decisions of the Second Circuit in *Owens v. United States*, 541 F.2d at 1388. Nevertheless, the court noted that "[t]he wisdom of the Second Circuit rule might be doubted, particularly in view of criticism within that court." *Id.* at 1388. *See also Barrie v. United States*, 615 F.2d 829, 830 (9th Cir. 1980) (following *Owens*). Several years later, in *Amella v. United States*, 732 F.2d 711, 714 (9th Cir. 1984), the court also felt obligated to follow the earlier opinions on the issue,

noting that although it "may not like § 742", it was compelled to follow it.

Similarly, in *Kenyon v. United States*, 676 F.2d 1229, 1231 (9th Cir. 1981), the court followed *Owens* with little substantive discussion. The *Kenyon* opinion also drew criticism from Justice Boochever who wrote a concurring opinion. Justice Boochever explained that it is the "first, or at most the first two sentences of 46 U.S.C. § 742 [which] constitutes the waiver of sovereign immunity by the United States" and that "[t]he subsequent sentences concerning service of process constitute a procedural requirement. . . . " *Id.* at 1231. Justice Boochever also suggested that were it not for the previous decisions on the issue, he "would conclude that the service of process provision in section 742 is procedural and has been supplemented by the provisions of Rule 4 specifying the method of service on the United States. . . . " *Id.* at 1232.

More recently, the Eleventh and Fifth Circuits also have adopted the view that forthwith service constitutes a matter of substance unaffected by the Federal Rules. *Libby v. United States*, 840 F.2d at 820; *Holmberg*, 19 F.3d at 1065; *Henderson*, 51 F.3d at 576. These courts have rigidly followed the approval of the Second and Ninth Circuits despite the harsh criticism and results this rule has generated over the years.

The Third Circuit, however, has used the correct and more reasonable analysis. In *Jones & Laughlin Steel*, the plaintiff filed suit on January 18, 1984, and sent notice to the appropriate federal agency the next day but failed to serve the Attorney General and United States Attorney until late March, well within the 120 days required by

Rule 4 but not "forthwith" as required by the SAA. 772 F.2d at 66. The court logically concluded that the SAA's forthwith service requirement constituted a matter of procedure rather than substance. *Id.* at 66. In so concluding, the court relied on the fact that Congress unified admiralty procedure and the Federal Rules in 1966. 112 CONG. REC. 4053 (1966); H. DOC. 391, 89th Cong., 2d Sess. (1966). Thus, the court reasoned that the provisions for service of process found in Rule 4 should govern service on the United States under the SAA. Specifically, the court held:

> This congressional enactment of a uniform 120-day period for accomplishing service of process [under Rule 4] must be read in light of 28 U.S.C. § 2072, [the Rules Enabling Act] which states that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Rule 4(j) therefore supersedes the Suits in Admiralty Act's requirement of forthwith service.

772 F.2d at 66.

At least two district courts have adopted the Third Circuit's reasoning. *Phillips*, 629 F. Supp. at 971; *Libby*, 657 F. Supp. at 1252. Other district courts, though bound by circuit precedents to the contrary, have expressed agreement with the Third Circuit's construction of the SAA. For instance, in *O'Halloran v. United States*, the court stated: "This Court finds the Third Circuit approach reasonable, particularly in light of the inherently ambiguous nature of the term forthwith. This Court also believes that rejecting the argument that § 742 is jurisdictional leads

to a fairer result. However, the Ninth Circuit has considered and rejected this very argument." 817 F. Supp. 829, 832 (N.D. Cal. 1993), *aff'd*, 45 F.3d 436 (9th Cir. 1994). *See also Hall v. Maritime Administration*, Civ. Action 92-3030, 1993 U.S. Dist. Lexis 5753 (E.D. La. 1993) (following Fifth Circuit precedent and concluding "with great reluctance" that plaintiff's complaint must be dismissed); *Pezzola v. United States*, 618 F. Supp. 544, 548 (D.C.N.Y. 1985) (dismissing the plaintiffs' complaint because the court is "confined to the *Battaglia* rule"). Only this Court can resolve this conflict and mandate a uniform rule for the timely service of process on the United States in suits brought under the SAA.

B. The Fifth Circuit's Interpretation Of The SAA's Service Requirement As Substantive Frustrates Congressional Intent.

1. The Provisions Of The SAA Negate An Unnecessarily Strict Interpretation Of The Forthwith Service Requirement.

The Fifth Circuit's interpretation of the SAA's forthwith service requirement as substantive, like that of the Second, Ninth, and Eleventh Circuits, fails to capture Congressional intent. Prior to 1916, the government enjoyed immunity from suits alleging damages inflicted by government owned and operated vessels. Recognizing the inequity of declining to compensate those damaged by government vessels, Congress passed the Shipping

Act of 1916,[6] which provided that U.S. vessels employed as merchant vessels would be subject to all laws, regulations and liabilities to which private merchant vessels were subjected. *Id*. However, when later litigants began to use *in rem* actions to seize government vessels, Congress passed the SAA in 1920 in order to allow *in personam* actions against the government.[7] In essence, Congress broadened the waiver of immunity in suits involving damages inflicted by public vessels by enacting the SAA.

From the outset, the plain language of the SAA declared Congress's intent that the government should be treated in the same manner as private litigants. Section 743 of the SAA specifically provides that "[s]uch suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." This provision plainly reveals Congress's intent to treat governmental and private vessels the same.

Continuing to allow the government to enjoy the forthwith service requirement, while private owners and operators of vessels are subject to the service requirements set out in Rule 4, defeats Congressional intent in enacting the SAA to place the government on equal terms with private litigants. *See* 46 U.S.C. § 742. In fact, this Court, in interpreting a different provision of the SAA, noted: "Congress has expressly declared that *when sued under the Suits in Admiralty Act the United States is to have*

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[6] Ch. 451, 39 Stat. 728 (1916) (codified as amended at 46 U.S.C. §§ 801-842 (1982)).

[7] Ch. 95, 41 Stat. 525 (1920) (codified as amended at 46 U.S.C. §§ 741-752 (1980)).

its procedural rights determined and governed in the same manner as private parties." United States v. Isthmian S.S. Co., 359 U.S. 314, 324 (1959) (emphasis added). The Third Circuit, in deciding that Rule 4 rather than the SAA's forthwith requirement governs the time for service on the United States, similarly relied on legislative intent in enacting the SAA to treat the United States as a private litigant. *Jones & Laughlin Steel*, 772 F.2d at 64.

Congress's specific intent in including the "forthwith" service requirement in the SAA is less clear. In fact, the legislative history of the Act lacks any explanation for the "forthwith" service requirement. 58 CONG. REC., 66th Cong., 1st Sess. 7317-7318, 7439-7440 (1919); 59 CONG. REC., 66th Cong., 2d Sess. 1692-1693, 1750-1759, 3350-3351, 3629-3631, 3690-3691 (1920). The courts holding that the provision is substantive cite no evidence nor do they rely on legislative history. *E.g., Kenyon*, 676 F.2d at 1231; *McAllister Bros.*, 278 F.2d at 709-710. Their rationale is based exclusively on the archaic principle of a limited waiver of sovereign immunity, which is only contained in the first two sentences of § 742. *Id.* This unnecessarily strict interpretation of the statute frustrates congressional intent that governmental liability equal that of private parties. 46 U.S.C. § 743.

The fact that courts have read this provision as substantive is equally perplexing. Historically, this Court has viewed service provisions which are calculated to give notice as procedural in nature. *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 445-446 (1946). Process has had no direct effect on jurisdiction and is primarily a vehicle for advising a party that he has been sued. *Id.*; *Greene v.*

Lindsey, 456 U.S. 444, 449 (1982) ("Personal service guarantees actual notice of the pendency of a legal action."). Consequently, any interpretation of the service provisions of the SAA as substantive is contrary to clear precedent on related matters.

Other provisions of the SAA also diffuse the view that the forthwith service requirement is substantive and not procedural. Section 745 of the SAA contains a two year limitations bar which operates to defeat jurisdiction. 46 U.S.C. § 745. Service is not a jurisdictional prerequisite for the timely "commencement" of a suit under the SAA. *Battaglia*, 303 F.2d at 685. Therefore service should not be considered as a substantive provision of the SAA. *See*, Gregory Ressa, *The Forthwith Service Requirement Of The Suits In Admiralty Act*, 54 FORDHAM L. REV. 1195, 1201 (1986).

Concluding that the forthwith service requirement is anything other than procedural seems particularly illogical in light of the other service requirements found in the SAA. Justice Boochever illustrates this point in his concurrence in *Kenyon*:

> Section 742 [of the SAA] specifies even the manner of mailing "by registered mail to the Attorney General of the United States." Certainly that provision is not to be considered as jurisdictional and would be superseded by the Federal Rule provision that states that a copy of the

> summons and complaint may be sent by "registered or certified mail to the Attorney General of the United States."

676 F.2d at 1232.

Indeed, in 1960, Congress broadened the scope of the waiver of sovereign immunity by removing the restriction as to merchant vessels.[8] The amendments also authorized the transfer of cases between the U.S. district courts and the court of claims. S. REP. No. 1894, 86th Cong., 2d Sess. (1960). The purpose of the amendments was "to make certain as possible that suits brought against the United States . . . through breach of contract or tort can be originally filed in the correct court so as to proceed to trial promptly on the merits." *Id.* at 2. Because counsel often unavoidably chose an inappropriate form, the bill was enacted to prevent dismissal of suits which would otherwise become time barred. The Senate Committee on the Judiciary, in recommending the passage of the amendments also noted that "[t]he reform of existing practice embodied in [the] bill is another expression of the underlying philosophy of the federal rules of civil procedure and of modern legal practice generally, that the decisive question in a lawsuit should, as far as possible, be its merits and not esoteric, technical problems of procedure." *Id.* at 7. Through these amendments, Congress again expressed its intent to reduce any chance of procedural traps which would prejudice private litigants.

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[8] Act of Sept. 13, 1960, Pub. L. No. 86-770, § 3, 74 Stat. 912 (codified at 46 U.S.C. § 742 (1982)).

As noted above, some courts have suggested that the SAA's forthwith service requirement constitutes an integral part of the government's waiver of sovereign immunity, and that Congress intended that immunity be maintained when service on the government is not forthwith. *E.g., Battaglia,* 303 F.2d at 685; *Kenyon,* 676 F.2d at 1232. This view of the forthwith requirement stems from the rule of statutory construction that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *McMahon v. United States,* 342 U.S. 25, 27 n.5 (1951). No rule of statutory construction requires, however, that each term within a statute waiving immunity be strictly construed. In fact, this Court has noted that narrowly construing specific terms of such a statute can defeat Congress's general intent to waive immunity. In *Indian Towing Co. v. United States,* this Court warned against "import[ing] immunity back into a statute designed to limit it." 350 U.S. 61, 69 (1955).[9]

Even Justice Friendly, who concurred in an opinion holding that the forthwith requirement constitutes an integral part of the government's waiver of immunity, remarked:

> I should have supposed that, once Congress gave the basic consent to sue the United States, as it did in the first sentence of § 2 of the Suits in

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[9] Echoing this Court's warning in *Indian Towing,* the court in *Weiss v. United States,* 168 F. Supp. 300, 301 (D.N.J. 1958), emphasized that a presumption in favor of immunity "does not mean that there must be a niggling and obnubilative adherence to the narrowest meaning of the words of the Act when the patent intent of Congress [is to waive immunity.]"

> Admiralty Act, it was content to have the courts decide the effect of various procedural lapses in the same manner as "if such vessel were privately owned or operated." The Act was "a comprehensive waiver by the United States" whereby "the government, in entering the shipping world as a participant, simply assumes a normal role in the antecedent pattern."

Battaglia, 303 F.2d at 686 (citation omitted) (*quoting* GILMORE & BLACK, ADMIRALTY 773-774 (1957)). Consequently, this Court should conclude that the procedures in Rule 4 govern actions brought under the SAA.

2. Because The Federal Rules Of Procedure Were Not In Effect At The Time Of Enactment Of The SAA, The Service Provisions In Rule 4 Are Controlling.

Congress's more likely intent for including the forthwith requirement in the SAA was simply to provide a time frame for service because no external rule regarding the timeliness of service existed when Congress enacted the SAA in 1920. The Federal Rules of Procedure were not enacted until 1938.[10] These rules were adopted to "materially reduce the uncertainty, delay, expense and

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[10] By the Act of June 19, 1934 (the Rules Enabling Act), Ch. 651, 48 Stat. 1064, the Supreme Court was authorized to prescribe general rules of civil procedure for the district courts. The original rules, pursuant to the 1934 Act, were adopted by order of this Court on December 20, 1937, transmitted to Congress by the Attorney General on January 3, 1938, and became effective on September 16, 1938 (83 CONG. REC., pt. 1, p. 13; H. Doc. 460, 75th Cong., 3d Sess. (1938)).

the likelihood that cases may be decided on technical points of procedure which had no relation to the just determination of the controversy on its merits." H. R. REP. No. 2743, 75th Cong., 3d Sess. 3 (1938). The 1938 notes of the Advisory Committee pertaining to Rule 4 state that the Rule is intended to "provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof." H. DOC. 588, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, 75th Cong., 3d Sess., at 5 (1938).

In 1966, the federal rules were amended and applied to admiralty suits. 112 CONG. REC. 4053 (1966); H. DOC. 391, 89th Cong., 2d Sess. (1966). The rules then "govern[ed] the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty." These amendments were "designed to unify the civil and admiralty procedure," and together with the Supplemental Rules for Maritime and Admiralty claims completely superseded the admiralty rules. H. Doc. 391, 89th Cong., 2d Sess., at 23 (1966). The Advisory Committee's notes to the amended rules stated that the change was intended to "abolish the distinction between civil actions and suits in admiralty." *Id.* at 24.

The fact that the federal rules did not apply to admiralty suits until 1966 was a crucial part of the analysis of the court in *Jones & Laughlin Steel*. Indeed, it is significant that the leading authority construing the SAA's forthwith requirement was decided *prior* to the application of the federal rules to admiralty suits. *E.g. McAllister Bros.*, 278 F.2d at 708; *Battaglia*, 303 F.2d at 683. After Congress

combined civil and admiralty procedure, the Ninth, Fifth, and Eleventh circuits nonetheless rigidly followed the authority of the Second Circuit without an analysis of the amendments to the federal rules. *See, Owens*, 541 F.2d at 1386; *Holmberg*, 19 F.3d at 1065; *Libby*, 840 F.2d at 818.

Justice Boochever, in his concurrence in *Kenyon*, also touted the view that Rule 4 succeeds the forthwith service requirement because of the absence of procedural rules at the time of the enactment of the SAA. 676 F.2d at 1231. Specifically, he states:

> [I]f freed from the bounds of *stare decisis*, I would hold that the service provision of Section 742 [the forthwith requirement] does not constitute an integral part of the substantive waiver of sovereign immunity, but is a mere procedural provision necessary at the time of the statute's enactment, to effectuate that waiver.

Id. at 1232. For these reasons, the more likely intent of Congress in including the forthwith service requirement in the SAA in 1920 was to provide a procedural guideline because there were no uniform federal rules of procedure. Once the Federal Rules were enacted, and made applicable to admiralty suits, they supplanted the SAA's contrary forthwith requirement.

3. Similar Statutes Which Were Enacted In Order To Effectuate A Waiver Of Immunity Also Compel The Court's Adoption Of The *Jones & Laughlin Steel* Analysis.

Reference to similar statutes which effectuate a waiver of sovereign immunity also compels the conclusion that Rule 4 take precedence over the provisions of the SAA. In 1926, Congress enacted the Public Vessels Act (PVA) which waived sovereign immunity with respect to public as well as merchant vessels. Act of March 3, 1925, ch. 428, 43 Stat. 1112.[11] The PVA provided that suits brought under the act "shall be subject to and proceed in accordance with the provisions of [the SAA]." *Id.* In 1946, Congress then enacted the Federal Tort Claims Act [FTCA] which governed maritime torts committed by the government, except for those torts for which a remedy was provided by the SAA or PVA. Act of Aug. 2, 1946, ch. 753, §§ 401-424, 60 Stat. 842.[12]

By enacting the FTCA, which waived sovereign immunity for all other torts not covered by the SAA or PVA, Congress created causes of action against the government that previously had not existed. All three of these statutes, the FTCA, the SAA, and the PVA, cover the gamut of tort claims against the government and are mutually exclusive.[13] *Keene Corp. v. U.S.*, 700 F.2d 836, 843 (2d Cir. 1983), *cert. denied*, 464 U.S. 864 (1984). In construing the FTCA, this Court has warned against "read[ing]

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[11] Current version at 46 U.S.C. §§ 781-790 (1982).

[12] Now 28 U.S.C. §§ 1346(b), 2671-2680 (1982).

[13] The FTCA expressly provides in section 2680(d) that it does not apply to suits in admiralty against the United States.

exemptions into the [FTCA] beyond those provided by Congress," *United States v. Muniz*, 374 U.S. 150, 166 (1963), and instructed that the FTCA is to be given a construction which will accomplish the legislative aim of relaxation of the rigor of sovereign immunity from suit. *Dalehite v. United States*, 346 U.S. 15, 30-31 (1953). Accordingly, this Court should adopt the same broad interpretation of the SAA as in the case of the FTCA. *See*, 54 FORDHAM L. REV. at 1200.

Equally persuasive is the fact that the FTCA is governed by and even incorporates Rule 4 of the federal rules. 28 U.S.C. § 2679; *E.g., Lambert v. United States*, 44 F.3d 296 (5th Cir. 1995); *Hunt v. Dep't of Air Force*, 29 F.3d 583 (11th Cir. 1994). If Congress therefore intended for the federal rules to govern procedure under the FTCA, there is no reason why the same procedure should not govern suits under the SAA. This Court has held that courts must interpret statutes on similar subjects with reference to each other.[14] *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). In other words, there is no reason why Congress would treat those injured at sea differently than those injured on land as far as service requirements are

[14] One commentator has suggested that these statutes should be construed *in pari materia* because they relate to tort actions against the government. *See* 54 FORDHAM L. REV. at 1207. "Construing the SAA and the FTCA *in pari materia* will lead courts to recognize that since Congress has intended these waivers to be interpreted liberally, courts should not regard the forthwith provision of the SAA as a jurisdictional precedent but rather a procedural device." *Id.* at n.48.

concerned. Such a distinction is particularly troublesome given that seamen are considered "wards of admiralty." *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377 (1932).

Similarly, reference to the Tucker Act,[15] a predecessor of the FTCA, also supports the inescapable conclusion that Rule 4 governs actions under the SAA. The Tucker Act creates jurisdiction in the United States Court of Federal claims and waives the government's sovereign immunity as to money damages for constitutional violations. 28 U.S.C. § 1491. When the federal rules of procedure became effective in 1938, the Tucker Act contained similar service provisions as those in the SAA. *See* 28 U.S.C. § 763 (1940 ed.). However, these service provisions were preempted by the enactment of Rule 4. Indeed, the Advisory Committee Notes to Rule 4 specifically listed section 763 among other statutes providing for service and stated that "[t]hese and similar statutes are modified in so far as they prescribe a different method of service or dispense with the service of a summons." H. Doc. 588, *supra*.

Similarly, courts considering conflicts between the new rules of procedure and various provisions of the Tucker Act concluded that the rules governed. *See Schram v. Koppin*, 35 F. Supp. 313, 314 (E.D. Mich. 1940); *Sherwood v. United States*, 112 F.2d 587, 590 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 584 (1941). In resolving a conflict

[15] Ch. 359, 24 Stat. 505 (1887); *see also*, 28 U.S.C. § 1346(a) (1982).

between service provisions in the Tucker Act[16] and Rule 4, the Eastern District of New York determined that the latter governed. *United States v. American Surety Co.*, 25 F. Supp. 700, 702 (E.D.N.Y. 1938). Specifically, the court stated: "It is to be presumed that the Supreme Court considered the problem of whether or not Sections 762 and 763 of 28 U.S.C.A. [the Tucker Act] were procedural or substantive and concluded that the procedure outlined therein could be altered by the new rules." *Id.* By analogy, this Court should also find that the service provisions in the SAA are governed by Rule 4.

4. Under The Rules Enabling Act, A Federal Rule Preempts A Federal Statute Governing Procedure.

The provisions of the Rules Enabling Act also militate in favor of a finding by this Court that Rule 4 supersedes the service provisions of the SAA. Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064. The Enabling Act was based on the Clayton Bill, first introduced in the House of Representatives in 1912.[17] The Clayton Bill specifically authorized the Supreme Court to prescribe "the mode and manner . . . of giving notice and service of process of all

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[16] The Tucker Act provided that upon filing his petition the "plaintiff shall cause a copy of his petition . . . to be served upon the district attorney . . . and shall mail a copy of the same, by registered letter, to the Attorney-General of the United States, and shall thereupon cause to be filed with the clerk of the court . . . an affidavit of such service and the mailing of such letter." 28 U.S.C. § 763 (1940 ed.).

[17] H.R. 26,462, 62nd Cong., 3d Sess. (1912), reprinted in 38 A.B.A. Rep. 542 (1913).

kinds." *Id.* In 1914, the House Committee recommended the Clayton Bill's passage with an additional provision. The Committee recommended that language be included to the effect that all conflicting laws would become of no further force and effect. The Committee concluded that an express statutory repeal of inconsistent existing statutes was not only desirable, but "necessary."[18]

The Clayton Bill eventually evolved into the Rules Enabling Act of 1934.[19] The Act provides that the court rule "shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 28 U.S.C. § 2072. The Act also states that " . . . all laws in conflict therewith shall be of no further force or effect." *Id.* Once enacted, the rules of procedure acquired the force of federal statutes "controlling all district courts." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941). It is thus clear that Congress intended a valid federal rule to supersede an inconsistent federal statute.

The details of service of process are precisely the type of procedural requirements the Federal Rules of Civil Procedure were designed to supplant. In fact, this Court has previously considered a conflict between Rule 4 service requirements and a contrary state statute in an analogous case. In *Hanna v. Plumer*, this Court decided that

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[18] *See* H.R. Rep. No. 462, 63d Cong., 2d Sess. 1, 16 (1914); Hearings on ABA Bills Before the House Comm. on the Judiciary, 63d Cong., 2d Sess. 22 (1914).

[19] *See* S. Rep. No. 1049, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1829, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 9362-63, 10,866 (1934). *Also see* Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1050-1098 (1982).

Rule 4, in allowing substituted service on an executor by leaving the process at his usual place of abode, supplanted a contrary state rule requiring in-hand service upon an executor. 380 U.S. 460 (1965). The rationale behind the decision in *Hanna* was that such details constituted matters of procedure governed by the Federal Rules. *Id.* at 473.

The analysis employed by the court in *Hanna* is also relevant to the conflict between the provisions of the SAA and Rule 4 in this case. In *Hanna*, this Court applied a two step analysis in determining whether the federal rules conflicted with prior law. First, this Court found that the conflicting rules must be examined. Under the first prong of the test, the "forthwith" requirement of the SAA and Rule 4 service requirements are clearly repugnant since courts have construed the term "forthwith" as considerably shorter than the 120 days allowed by Rule 4. If the rules have the same purpose, then one must be given preference over the other. *Id.* at 462-463; *also see* 54 FORDHAM L. REV. 1205-1206.

The second inquiry is whether the federal rule is within the Supreme Court's authority under the Rules Enabling Act and is constitutional. *Id.* at 464, 472. If so, then it is a valid rule superseding the conflicting rule. Because Congress has the inherent power to make rules governing practice and procedure in federal courts, *id.* at 472, this statutory scheme is constitutional. Rule 4(j) also falls within the Supreme Court's power under the Enabling Act because it does not effect the substantive rights of any litigant. Accordingly, Rule 4(j) is a valid federal rule which supersedes the "forthwith" provision of the SAA.

5. Alternatively, Rule 4 Was Enacted Pursuant To The Federal Rules Of Civil Procedure Amendments Act Of 1982 And Superseded The Provisions Of The SAA.

The circumstances surrounding the enactment of Rule 4 also compel a finding that Rule 4 supplants the provisions of the SAA. The Federal Rules of Civil Procedure are usually not the product of direct congressional legislation. As a general rule, the federal rules are promulgated by this Court pursuant to the Rules Enabling Act, 28 U.S.C. § 2072. Historically, Congress has acceded to the recommendations of the Supreme Court and adopted the rules as drafted by this Court. However, in adopting the 120-day requirement of Rule 4 in 1982, Congress exercised its power to reject the changes proposed by the Supreme Court and instead rewrote Rule 4 legislatively.

On April 28, 1982, this Court transmitted to Congress several proposed amendments to the Federal Rules of Procedure including the amendments to Rule 4 with the 120 day service requirement.[20] These amendments were to have taken effect on August 1, 1982. However, because of numerous complaints concerning proposed Rule 4,[21] Congress then enacted Public Law 97-227, postponing the effective date of the proposed amendments to Rule 4 until October 1, 1983. All other amendments to the Rules of Procedure took effect on August 1, 1982 as scheduled.

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[20] *See* 128 CONG. REC. 30930 (1982); H. DOC. 173, 75th Cong., 3d Sess. (1982).

[21] H.R. REP. No. 662, 97th Cong., 2d Sess. (1982).

In response to the widespread criticism of Rule 4, Congress then rejected the amendment outright and went to work in drafting its own rule. *See* David Siegel, *Practice Commentary on Amendment of Federal Rule 4 (eff. Feb. 6, 1983) with Special Statute of Limitations Precautions*, 96 F.R.D. 88, 92 (1983). Congressman Don Edwards of California and Congressman McClory of Illinois introduced a bill to address in part the fact that the rule proposed by the Supreme Court did not address situations where service was defective through no fault of the party requesting service. H.R. REP. NO. 662, at p. 4; 128 CONG. REC. 30929-30934 (1982). Congress then passed the Federal Rules of Civil Procedure Amendments Act of 1982 and exercised its inherent power to reject the changes proposed by the Supreme Court. *See* H.R. 7154, 97th Cong., 2d Sess. (1982); 128 CONG. REC. 30929-30937, 32476-32477, 32904-32905, 33132 (1982). The present rule 4, including the 120 day service requirement and "good cause" exception, is the amendment drafted by Congress and not this Court. Pub. L. 97-462, § 2, 96 Stat. 2527 (1983).

When the court in *Amella, supra*, questioned the "dubious assumption" that the Federal Rules of Civil Procedure could amend an act of Congress, 732 F.2d at 713, the court did not even consider the fact that Rule 4 was drafted by Congress. Implicit in the court's reasoning in *Amella* and other circuit decisions in which the courts have found the "forthwith" requirement to be substantive, is that such rights cannot be altered except by Congress. However, this is precisely what Congress did in 1982 when it rewrote Rule 4 legislatively. *Also see* George Walker, *The 1983 Amendments to Federal Rule of Civil Procedure 4 – Process, Jurisdiction, and Erie Principles Revisited*, 19 WAKE FOREST L. REV. 957 (1983) (stating that "Rule 4(j) is

a statutory command under the Federal Rules of Civil Procedure Amendments Act of 1982, which is of equal dignity with the Enabling Act").

General principles of statutory construction further support the view that Rule 4(j) applies, and was intended to apply, generally to all actions filed in federal courts. When a general statute is enacted after a specific statute and is incompatible with the earlier specific statute, it is construed to supersede the specific statute. *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973). Furthermore, prior specific statutes are considered repealed by implication "when a comprehensive revision of a particular subject is promulgated. . . . " 1A J. SUTHERLAND, STATUTORY CONSTRUCTION, § 23.15, at 376 (5th ed. 1992).

When Congress established a 120-day period within which a complaint could be served, Congress intended to bring uniformity to the timeliness of service issue. Congress is presumed to be aware of existing statutes and judicial decisions when it enacts new legislation, and is presumed to intend to achieve a consistent body of law. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Thus, when Rule 4 was enacted, Congress is presumed to have been aware of the "forthwith" service provision in the SAA and the decisions construing that statute. If Congress intended there to be any exception to the general rule it was prescribing, it certainly could have created exceptions to Rule 4. However, no such intention appears in the language of Rule 4 or in the legislative history of the Rule. *E.g.*, 128 CONG. REC. 30929-30937, 32476-32477, 32904-32905, 33132 (1982). Because Rule 4 was legislatively written by Congress, this Court should conclude that it replaces the "forthwith" service provision.

C. The Fifth Circuit's Interpretation Of The SAA's Service Requirements Leads To Inconsistent Results.

Application of the forthwith service requirement rather than Rule 4's 120-day requirement leads to inconsistent results because the term "forthwith," in the words of one court is "inherently ambiguous." *O'Halloran*, 817 F. Supp. at 831. Courts across the country vary widely in their determinations of what is and what is not forthwith service. *E.g., Holmberg*, 19 F.3d at 1065 (holding that service on the United States 106 days following filing suit was not forthwith); *Kenyon*, 676 F.2d at 1231 (holding that service on the United States 60 days after filing suit was not forthwith); *Owens*, 541 F.2d at 1388 (holding that service on the United States 58 days after filing suit was not forthwith); *O'Halloran*, 817 F. Supp. at 831 (holding that service on the United States 77 days after filing suit was not forthwith); *Libby*, 657 F. Supp. at 1253 (holding that service on the United States 21 days after filing suit was forthwith). This bewildering variation among the courts in interpreting the term "forthwith" serves only to confuse litigants.

Prior to the 1982 amendments to Rule 4, the timeliness of service of process was judged by a "due diligence" standard, except in cases under the SAA. *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544, 550 (5th Cir. 1959); *Grammenos v. C.M. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1971). While "due diligence" and the "forthwith" language of the Act were defined differently by the courts, both shared a common infirmity: neither had a

clear definition of what was "due diligence" and "forthwith." This Court has often noted that courts and litigants are best served by bright-line rules, especially in cases involving harsh consequences such as the loss of a right to proceed to trial on the merits. *E.g., Houston v. Lack*, 487 U.S. 266, 267 (1988) (adopting bright-line rule recognizing inmate's notice of appeal filed upon receipt by prison authorities); *Budinich v. Becton Dickenson & Co.*, 486 U.S. 196, 202 (1988) ("courts and litigants are best served by the bright-line rule, . . . that a decision on the merits is a 'final decision' for purposes of § 1291"). By enacting the 120-day service requirement, Congress obviously intended to uniformly define the term for service in all federal litigation.

The lack of uniformity among the courts concerning the amount of time which is "forthwith" under the SAA also raises due process and equal protection concerns. U.S. CONST. Amend. V. Nothing in the language of Rule 4(j) or in the rules' legislative history suggests a legislative intent to exclude any class of federal actions from the 120-day service requirement, with the exception of service in a foreign country. In fact, there does not appear to be any other category of federal actions involving the United States that is not subject to Rule 4(j). *E.g., Lambert*, 44 F.3d at 296 (applying Rule 4 in suit based on the FTCA). Likewise, unwary litigants who fail to effect service "forthwith" are precluded from receiving a trial on the merits.

If Congress intended Section 742 to survive the enactment of Rule 4, that intention would at least be discernable from the language of the Rule or its legislative history. The "forthwith" requirement not only thwarts the

will of Congress, but produces a result contrary to the well-settled legislative and judicial policy of treating seamen as "wards of admiralty," whether they work on public or private vessels. *See e.g.*, THE JONES ACT, 46 U.S.C. § 688; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246 (1942). Certainly, Congress did not intend that seamen should find themselves subjected to a harsh and nebulous time limit for instituting their federal court actions from which their land-based brethren had been freed.

Arguably, when the SAA was enacted, Congress left the term "forthwith" deliberately undefined in order to allow the courts to determine "reasonableness" under the particular circumstances.[22] However, Rule 4 now provides a definite time limit which courts must implement in defining reasonableness under the circumstances; service of process occurring more than 120 days after the filing of a complaint is not diligent unless "good cause" is shown. At least one court has suggested that "even if Rule 4(j) does not supersede 46 U.S.C. § 742, reading the two in conjunction would seem to establish 120 days as an outside limit against which to judge the timeliness of service." *Libby*, 657 F. Supp. at 1253.

Even those courts that have employed the forthwith service requirement have expressed the opinion that the requirement failed to promote justice. In *Amella*, 732 F.2d

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[22] Black's Law Dictionary defines "forthwith" as "within a reasonable time under the circumstances of the case." BLACK'S LAW DICTIONARY, 588 (5th ed. 1979).

at 712, the Ninth Circuit affirmed the dismissal of a case that was not served "forthwith" with these remarks:

> Lawyers unfamiliar with the ways of admiralty or careless on their watch will encounter this statute as a hidden reef that can be a jurisdictional bar to an otherwise meritorious suit. . . . It is a sad case. . . . One of the "problems which a legal system must face is a combination of a due regard for claims of substantial justice with a system of procedure rigid enough to be workable," but § 742 appears to strike the balance too far in favor of formalism, to the detriment of justice. . . . If Congress were to take the statute off the books, we should feel no remorse; but until Congress awakes to action, we are bound by the statutory requirement.

Id. at 712, 714 (*quoting* 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 196 (1909)).

Likewise, the court in *Libby, supra*, when adopting the Third Circuit's holding that Rule 4 supplants the SAA's forthwith requirement stated:

> Adoption of this holding avoids the unnecessary delay and expense of litigation in cases of this type over whether a certain number of days is "forthwith" within the meaning of 46 U.S.C. § 742 [The SAA]. The policies of deciding cases on their merits and fostering judicial economy are better served by the definitive 120 day time limit established by Rule 4(j). . . . [T]his Court can see no reason to judicially maintain this trap for the unwary.

657 F. Supp. at 1252-53. Only this Court's adoption of Rule 4 in suits under the SAA can end the drastic variations among the lower courts in determining what constitutes forthwith service.

II. The Fifth Circuit's Interpretation Of The SAA's Service Requirements Restricts The District Courts' Power To Extend The Time For Service Under Any Circumstances.

The Fifth Circuit held that the district court's extension of the time for service in this case had no effect because the SAA's forthwith service requirement is jurisdictional in nature. 51 F.3d at 576. In other words, according to the Fifth Circuit, district courts lack the power to extend the forthwith service requirement under any circumstances. Thus, even the government's own failure to provide the necessary summons will not serve as a basis for enlarging the time to properly effect service.

Even if the forthwith service requirement applies to suits brought under the SAA, rather than Rule 4, the district courts should maintain the power to extend the time for service in appropriate circumstances. The Fifth Circuit previously addressed an analogous issue in *McCormick v. United States*, 680 F.2d 345 (1982). That case involved a suit under the SAA brought against the United States after the statutory limitations period had elapsed. The United States argued that because the SAA reflects a waiver of sovereign immunity, the limitations period is jurisdictional in nature and cannot be tolled under any circumstances. *Id.* at 350. The Fifth Circuit rejected the United States' argument, relying heavily on this Court's

decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

In addressing the issue of whether a limitations period in a federal statute providing a new cause of action could be tolled, this Court in *American Pipe* concluded:

> [T]he mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

Id. at 559. Heeding *American Pipe*, the Fifth Circuit held in its own decision on the issue:

> We cannot accept the government's position, and the district court's holding that the SAA limitations provisions can never be tolled. We hold that the two-year limitation on suits under the SAA can be tolled under appropriate circumstances where to do so would not defeat the purpose of the provision, which is to encourage those with claims against the United States to present their claims promptly and diligently, and where injustice to the plaintiff would otherwise result.

McCormick, 680 F.2d at 351. Likewise, federal courts should possess the power to extend the forthwith service requirement under the SAA in appropriate circumstances despite the fact that the SAA's forthwith service requirement may be jurisdictional in nature.

The facts of this case further illustrate the need for a precise rule which would allow the courts to extend the time period for service in suits under the SAA. Here, Henderson immediately requested the appropriate summons forms from the district clerk's office at the time he filed his complaint on April 3, 1993 (App. 42, 51). However, it was the district clerk's own lack of diligence and failure to include the proper seal on the summons which resulted in the delay in service upon the government (App. 42, 51-52, 57-64). In fact, Mr. Henderson's counsel was not notified until June 1, 1993 about the defect in the summons because of the absence of the court's seal (App. 52, 57-58). Although new summons forms were immediately requested by Mr. Henderson's counsel upon learning of the defect, the substitute summons forms were not received until August 25, 1993, again because of delay by the district clerk's office (App. 52, 59-64). It would be ironic indeed to disallow a litigant to receive additional time to effect service upon the government when it is the government's own delay which resulted in the need for that extension.

Furthermore, a refusal to allow courts to grant extensions under appropriate circumstances undermines the underlying purpose of serving a defendant with process: that is, to provide litigants with notice of a pending lawsuit. For example, in the present case, Mr. Henderson sustained his injuries on August 27, 1991, and filed his lawsuit on April 8, 1993, well within the limitations period (App. 5-12). However, his case was dismissed because he was not able to effect service until September 3, 1993, only a few days after limitations expired (Pet. App. 8). On the other hand, a litigant who waits until the

day before the limitations period expires, and who then takes an additional thirty days to effect service, would be able to maintain his suit under existing law. In other words, the government is first put on notice of the suit and served under the second scenario at a later date than what exists in this case, yet that suit is presumed valid while Mr. Henderson's lawsuit is not.[23] Simply stated, the law lends itself to arbitrary and unjust results, and it fails to promote the policy of preventing stale claims.

Equally frustrating is the fact that still other admiralty litigants who inadvertently file their complaint based upon the incorrect statute can avoid the "forthwith" requirement. For example, in *Ashland v. Ling-Temco-Vought, Inc.*, 711 F.2d 1431, 1436 (9th Cir. 1983), the court considered a situation where although the case was filed five days before the statute of limitations expired, service of process did not occur until over one hundred days later. The plaintiff had also erroneously filed his claim based upon the Federal Tort Claims Act instead of the SAA. *Id.* at 1436. The trial court allowed the plaintiff to amend his complaint to state a proper basis for jurisdiction under the SAA, and the court of appeals affirmed that decision. The court found that the plaintiff's original failure to comply with the forthwith service requirement of the SAA was irrelevant because the plaintiff's subsequent filing and service were properly allowed under existing law to relate back to the original filing under

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[23] In fact, in this case, the government was first put on notice of Mr. Henderson's lawsuit when the Attorney General was served on May 25, 1993 (App. 42, 52), more than three months before the two-year statute of limitations ran.

Rule 15(c). *Id.* Consequently, under the present state of the law, "the poorer pleader" will be able to maintain his suit, while another litigant who stated a proper basis for jurisdiction would not. *Libby*, 657 F. Supp. at 1253 n.4.

In this case, given the difficulties Mr. Henderson faced in serving the United States, the district court considered an extension of time appropriate. The district court's evaluation of the circumstances should be respected even if the forthwith requirement governs the time for service under the SAA. Allowing an extension in appropriate circumstances does not defeat the purpose of prompt service on the United States and protects the plaintiff against injustice when the failure to serve the United States forthwith is inadvertent and dismissal results, as it did here, in a lost cause of action.

CONCLUSION

Petitioner respectfully urges this Court to reverse this case and decide that Rule 4's 120-day service requirement supplants the SAA's forthwith service requirement. Alternatively, Petitioner respectfully urges this Court to decide that district courts may extend the time for service provided by the SAA in appropriate circumstances. This case should be reversed and remended for trial on the merits.

Respectfully submitted,

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

LLOYD HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the requirement of the Suits in Admiralty Act that a complaint be served "forthwith" has been superseded by Federal Rule of Civil Procedure 4(j) (1988), which requires service within 120 days.

2. Whether the district court correctly dismissed petitioner's complaint for failure to effect service "forthwith."

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G. Gilmore & C. Black, *The Law of Admiralty* (1st ed. 1957) 4
G. Reesa, Note, *Rule 4(j) of the Federal Rules of Civil Procedure and the Forthwith Service Requirement of the Suits in Admiralty Act*, 54 Fordham L. Rev. 1195 (1986) 20
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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-232

LLOYD HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 51 F.3d 574. The order of the district court (Pet. App. 8-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1995. The petition for a writ of certiorari was filed on August 8, 1995, and was granted on November 22, 1995 (116 S. Ct. 493). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The following statutes and rules are set forth in the appendix to this brief: 28 U.S.C. 2072 (Rules

Enabling Act); 46 U.S.C. App. 742 and 743 (Suits in Admiralty Act); Federal Rule of Civil Procedure 4(j) (1988); and Federal Rule of Civil Procedure 82.

STATEMENT

A. Statutory Background

1. Prior to 1916, the doctrine of sovereign immunity barred any admiralty suit against the United States. In order to redress harms done to private parties by the government's vessels and alleviate the need for private bills designed to compensate such persons, Congress in 1916 enacted the Shipping Act, ch. 451, 39 Stat. 728. That statute "establish[ed] a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine." 39 Stat. 728 (preamble). Section 9 of the Act provided that Shipping Board vessels employed as merchant vessels were subject to "all laws, regulations, and liabilities governing merchant vessels." 39 Stat. 730-731.

In *The Lake Monroe*, 250 U.S. 246 (1919), this Court construed the Shipping Act as subjecting Shipping Board merchant vessels to all the incidents of private in rem admiralty actions, including arrest and seizure of the vessel. As a result of the *Lake Monroe* decision, the United States was required to appear and post bond for the release of vessels arrested and seized pursuant to in rem admiralty proceedings. See *Blamberg Bros.* v. *United States*, 260 U.S. 452, 458-459 (1923). The Suits in Admiralty Act (SAA), ch. 95, 41 Stat. 525 (1920) (46 U.S.C. App. 741-752), enacted in response to the decision in *Lake Monroe*,[1] represents

[1] See *Blamberg Bros.*, 260 U.S. at 458 (SAA "was passed to avoid the embarrassment to which the Government found itself

Congress's effort to permit the adjudication of admiralty actions against the United States in a manner that does not unduly interfere with the government's conduct of maritime operations.[2] See generally *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 170-171 (1976); *Stevens Technical Services, Inc.* v. *United States*, 913 F.2d 1521, 1527 (11th Cir. 1990).

Section 1 of the SAA provides that "[n]o vessel owned by the United States * * * [shall] be subject

subjected by the [Shipping Act], by the ninth section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens") (citing *Lake Monroe*).

[2] The legislative history of the SAA indicates that Congress was made aware of a need for promptness in admiralty litigation, including suits against the United States. Ira A. Campbell, a Special Assistant to the Attorney General in Admiralty who helped to draft the SAA, testified that

> [t]his bill * * * is providing the machinery by which all admiralty litigation can be handled. Here is what you are facing as the result of the conditions to-day * * *. There is no litigation which requires such prompt and immediate action, if it is properly taken care of, as admiralty litigation[,] * * * because your witnesses are all sailors, as a rule; your vessels come into the port where sailors disappear and you can not find them. So it may be that your case will be won or lost upon the one man whom it is impossible to locate. * * * [I]nasmuch as Congress is passing these [private] bills constantly, and creating the right of suit in such cases, it might be well to consider the advisability of authorizing such litigation, so that such litigation may be taken care of promptly by the Government.

Suits in Admiralty Against the United States: Hearing on S. 2253 Before the Senate Comm. on Commerce, 66th Cong., 1st Sess. 27-28 (1919).

to arrest or seizure by judicial process in the United States or its possessions." 46 U.S.C. App. 741. Section 2 of the Act replaces the in rem action with the right to file a "libel in personam." 46 U.S.C. App. 742.[3] Section 742 states that, "[i]n cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States." 46 U.S.C. App. 742.[4] That Section requires that "[t]he libelant shall forthwith serve a copy of his libel on the United States attorney for such district [the district in which suit is filed] and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States." *Ibid.*[5]

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[3] "In the parlance of admiralty law, a 'libel' is a complaint." *Interpool Ltd.* v. *Char Yigh Marine (Panama) S.A.*, 890 F.2d 1453, 1457 n.8 (1989) (citing G. Gilmore & C. Black, *The Law of Admiralty* § 1-12, at 34 (1st ed. 1957)), amended on denial of reh'g, 918 F.2d 1476 (9th Cir. 1990).

[4] See *United States Shipping Board Emergency Fleet Corp.* v. *Rosenberg Bros. & Co.*, 276 U.S. 202, 212 (1928) (SAA serves "to exempt from seizure and arrest merchant vessels of the United States operated by it and its subordinate shipping corporations and to substitute for a suit in rem one in personam * * * in which the personal liability of the United States took the place of the vessel").

[5] The first in a succession of bills providing for suits in admiralty against the United States was introduced as S. 3295, 50th Cong., 1st Sess. (1888). It was not until 1910, however, that the forthwith service language appeared in these legislative proposals. In hearings before a subcommittee of the Senate Judiciary Committee, the following colloquy occurred between

Section 3 of the SAA states that "[s]uch suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. 743. Section 743 further provides that, "[i]f the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit." *Ibid.*; see *Canadian Aviator* v. *United States*, 324 U.S. 215, 226-227 (1945) (SAA permits recovery against the United States under either in personam or in rem principles). Section 5 of the Act states that suits under the SAA "may be brought only within two

---

Senator Brandegee and Archibald G. Thacher, Proctor in Admiralty, who appeared before the subcommittee:

> Senator Brandegee. In section 3 should there not be some provision as to when all these things should be done?
>
> Mr. Thacher. The filing of the libel would have to be done within two years of the cause of action.
>
> Senator Brandegee. But the serving of the Attorney-General?
>
> Mr. Thacher. I should say serve "forthwith." There is no reason why it should not be done promptly after the filing of the libel.

Amendments to Admiralty Law: Hearings Before the Subcomm. of the Senate Comm. on the Judiciary, 61st Cong., 2d Sess. 16 (1910). The next version of the bill, S. 7627, 61st Cong., 2d Sess. (1910), contained the requirement that the libel be served "forthwith."

years after the cause of action arises." 46 U.S.C. App. 745.

2. The Clarification Act of March 24, 1943, ch. 26, § 1, 57 Stat. 45, provides an action for claims arising from employment in the crew of vessels owned by the United States through the Maritime Administration, the successor to the War Shipping Administration.[6] The statute provides that

> [o]fficers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to * * * death, injuries, illness, maintenance and cure, loss of effects, detention or repatriation, * * * have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels.

50 U.S.C. App. 1291(a). See generally *Martin* v. *Miller*, 65 F.3d 434, 437-438 (5th Cir. 1995) (discussing history of the Clarification Act). The Act further provides that such claims "shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act." 50 U.S.C. App. 1291(a).[7]

3. At the times that petitioner filed and served his complaint in the instant case, Federal Rule of Civil Procedure 4(j) (1988) provided as follows:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

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[6] "[D]uring most of the Second World War substantially our entire merchant marine became part of a single vast shipping pool, said to have been the largest in history, operated and controlled by the United States through the War Shipping Administration." *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U.S. 707, 709 (1946) (footnote omitted). The War Shipping Administration was established by Executive Order on February 7, 1942. See *id.* at 709 n.2. Approximately three years after the passage of the Clarification Act, the functions of the War Shipping Administration were transferred to the United States Maritime Commission (the successor agency to the Shipping Board, see *id.* at 717 n.21) by the Act of July 8, 1946, ch. 543, § 202, 60 Stat. 501, and subsequently to its successor agency the Maritime Administration. Reorganization Plan No. 21 of 1950, 64 Stat. 1273; see *Martin* v. *Miller*, 65 F.3d 434, 439 (5th Cir. 1995). The Maritime Administration was transferred from the Department of Commerce to the Department of Transportation by the Maritime Act of 1981, Pub. L. No. 97-31, 95 Stat. 151.

[7] The Clarification Act states that "[t]he term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration." 50 U.S.C. App. 1291(a). See *McMahon* v. *United States*, 342 U.S. 25, 26-28 (1951) (discussing administrative claim requirement). The Maritime Administration's current regulation governing administrative claims is set forth at 46 C.F.R. Part 327.

Effective December 1, 1993, Rule 4(j) was renumbered 4(m) and was amended in respects not relevant to this case.[8]

B. Proceedings Below

1. After complying with the administrative claim requirement of the Clarification Act (see J.A. 18), petitioner filed a seaman's personal injury action against the United States on April 8, 1993. See J.A. 5-12 (complaint).[9] The complaint alleged that petitioner

[8] At the times that the complaint in this case was filed and served, Federal Rule of Civil Procedure 4(d)(4) (1988) provided that a complaint shall be served upon the United States "by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States." Federal Rule of Civil Procedure 12(a) (1988) provided that "[t]he United States * * * shall serve an answer to the complaint * * * within 60 days after the service upon the United States attorney."

[9] Petitioner's complaint invoked both the SAA and the Public Vessels Act (PVA), 46 U.S.C. App. 781-790. See J.A. 5. The PVA provides that "[a] libel in personam in admiralty may be brought against the United States * * * for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States." 46 U.S.C. App. 781. See *United Continental Tuna*, 425 U.S. at 171-172 (discussing history and purpose of PVA). Because the Clarification Act provides that claims arising from employment aboard Maritime Administration vessels "shall * * * be enforced pursuant to the provisions of the Suits in Admiralty Act," 50 U.S.C. App. 1291(a), see pages 6-7, *supra*, petitioner had no cause of action under the PVA. In any event, the

had suffered "serious and permanent injuries * * * on or about August 27, 1991," J.A. 6, while acting "in the course and scope of his employment aboard the vessel in question," J.A. 7. Although petitioner's attorneys maintained their offices in Houston, see J.A. 12, the complaint was filed in the Galveston Division of the Southern District of Texas rather than in the Houston Division. See Pet. Br. 4; J.A. 5.[10]

Petitioner's attorneys thereafter sought to obtain the appropriate summons forms by mail. Pet. Br. 4-5; J.A. 51-52.[11] They also engaged a local "constable" to effectuate service on the United States. Pet. Br. 4-5; J.A. 52, 55-56. Those indirect dealings with the Gal-

requirement of "forthwith service" applies equally to PVA actions, since the PVA provides that "[s]uch suits shall be subject to and proceed in accordance with the provisions of" the SAA. 46 U.S.C. App. 782.

[10] Suits under the SAA may be brought "in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found." 46 U.S.C. App. 742. The complaint in this case alleged that petitioner resided within the Southern District of Texas. J.A. 6. The record contains no explanation of petitioner's decision to file suit in the Galveston Division rather than in the Houston Division.

[11] At the times that petitioner's complaint was filed and served, Federal Rule of Civil Procedure 4(a) (1988) provided: "Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint." Rule 4(b) provided that "[t]he summons shall be signed by the clerk [and] be under the seal of the court." Rule 4(d) stated that "[t]he summons and complaint shall be served together." The substance of those provisions is retained in current Rules 4(a), (b), and (c)(1).

veston district court's clerk's office precipitated a series of mishaps with the mail and, apparently, with counsel's ability to secure properly completed summons forms. Pet. Br. 5; J.A. 52. The Attorney General received a copy of the complaint (served on her by mail) on May 25, 1993, 47 days after it was filed. See Pet. Br. 5; J.A. 52. On August 30, 1993, 144 days after filing his complaint, petitioner filed a motion for postponement in the district court, in which he claimed to have been unable to complete service on the appropriate United States Attorney due to difficulties obtaining the proper summons form and with the mail. Pet. Br. 6; J.A. 13-14; Pet. App. 2. The court granted petitioner 15 days to complete service, J.A. 15, and the United States Attorney was served on September 3, 1993, 148 days after petitioner filed suit. Pet. Br. 6; J.A. 33-34; Pet. App. 2. On the government's unopposed motion, the case was subsequently transferred to the Eastern District of Texas, Beaumont Division. See J.A. 43.[2]

2. The United States moved to dismiss the action, arguing that petitioner's failure to effect service of the complaint "forthwith," as required by the SAA, deprived the court of subject-matter jurisdiction. The district court denied the motion without opinion. Pet. App. 2. After the district court denied the motion, the Fifth Circuit issued its opinion in *United States* v. *Holmberg*, 19 F.3d 1062, cert. denied, 115 S. Ct. 482 (1994). The court in *Holmberg* held that the SAA's waiver of sovereign immunity is conditioned

[2] Section 2 of the SAA provides that "[u]pon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States." 46 U.S.C. App. 742.

upon the plaintiff's compliance with Section 2 of the SAA, 46 U.S.C. App. 742. 19 F.3d at 1064. Because "[c]onditions to a waiver of sovereign immunity are necessarily jurisdictional in nature," *ibid.*, the court reasoned, a plaintiff's failure to effect service of a complaint upon the government "forthwith," as required by Section 742, deprives the district court of jurisdiction over his claim, 19 F.3d at 1065. The court also held that Section 742 "involves substantive rights because it defines the scope of the Government's consent to be sued," and that its requirements therefore could not be modified by Federal Rule of Civil Procedure 4(j). 19 F.3d at 1065. The court "agree[d] that there has been no uniform definition of forthwith" but concluded that, "under any definition, service in 103 or 106 days" would not satisfy the requirements of Section 742. 19 F.3d at 1065. In light of the Fifth Circuit's decision in *Holmberg*, the district court in the instant case reconsidered its ruling and dismissed petitioner's complaint without prejudice for lack of subject-matter jurisdiction. Pet. App. 2, 8-9.

3. The court of appeals affirmed. Pet. App. 1-7. Because the requirements of Section 742 are jurisdictional, the court held, the district court's decision to grant petitioner a 15-day extension to file his complaint "did not affect either the court's subject-matter jurisdiction or [petitioner's] obligations under § 742." Pet. App. 5-6. Relying on *Holmberg*, the court held that petitioner, who had served his complaint on the United States Attorney 148 days after it was filed, could not be said to have effected service "forthwith." Pet. App. 6. Finally, the court held that the word "forthwith" in Section 742 "applies both to the service of a copy of the complaint on the United States Attorney and to the mailing of a copy of the complaint

by registered mail to the Attorney General of the United States." Pet. App. 7. The court therefore declined to decide whether service of the complaint on the Attorney General (47 days after its filing) had been effected "forthwith," explaining that service upon the Attorney General alone would not, in any event, suffice to satisfy the requirements of Section 742. Pet. App. 7.[13]

SUMMARY OF ARGUMENT

1. The statutory requirement that the complaint in an SAA suit be served "forthwith" has not been impliedly repealed by Federal Rule of Civil Procedure 4(j), which generally mandates that a complaint not served within 120 days shall be dismissed without prejudice. This Court has repeatedly emphasized that, "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotation marks omit-

[13] The Fifth Circuit's decision in the instant case was in accord with rulings of the Second, Ninth, and Eleventh Circuits, the other circuits that hear the vast majority of admiralty cases. See, *e.g.*, *Libby* v. *United States*, 840 F.2d 818, 819-821 (11th Cir. 1988); *Amella* v. *United States*, 732 F.2d 711, 713 (9th Cir. 1984); *Kenyon* v. *United States*, 676 F.2d 1229, 1231 (9th Cir. 1981); *Battaglia* v. *United States*, 303 F.2d 683, 685-686 (2d Cir.), cert. dismissed, 371 U.S. 907 (1962). The Third Circuit has expressed the contrary view, stating that "Rule 4(j) * * * supersedes the Suits in Admiralty Act's requirement of forthwith service." *Jones & Laughlin Steel, Inc.* v. *Mon River Towing, Inc.*, 772 F.2d 62, 66 (3d Cir. 1985). That statement was dictum, however, since the Third Circuit held that it lacked jurisdiction under the SAA and that jurisdiction existed only under the Federal Tort Claims Act. *Id.* at 64-65.

ted). Rule 4(j) does not confer an affirmative right to take 120 days to serve the complaint. It simply states that, "[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court * * * shall dismiss the action without prejudice." The Rule thereby establishes an outer boundary for timely service in federal civil cases generally. The determination that *no* plaintiff (absent a showing of good cause) should take more than 120 days to serve a complaint is in no way inconsistent with Congress's decision to require immediate service in a particular category of cases.

Contrary to petitioner's argument, the SAA was not intended to subject the United States to the entire body of law applicable to admiralty suits between private parties. With respect to matters not covered by a specific provision of the SAA, the statute makes clear that SAA suits "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. 743. Congress might have permitted the time for service of the complaint to be similarly governed by the rules applicable to suits against private defendants, but it chose to insist that the complaint be served "forthwith." In other respects as well—*e.g.*, a shortened statute of limitations, and a prohibition on the arrest and seizure of the purportedly offending vessel—the SAA specifies a rule different from that applicable to private admiralty litigation. Nothing in the Federal Rules of Civil Procedure undermines Congress's determination that certain matters, including the time for serving the complaint, should be the subject of an SAA-specific rule rather than left to the general

principles governing most litigation against private defendants.

2. Even if Rule 4(j) were generally construed to confer an affirmative right to serve the complaint at any time within the 120-day period, it could not supersede the SAA's requirement that the complaint be served "forthwith." It is well established that "[s]overeign immunity is jurisdictional in nature," and that "the terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *FDIC* v. *Meyer*, 114 S. Ct. 996, 1000 (1994) (brackets and internal quotation marks omitted). Compliance with the SAA's requirement of forthwith service is therefore a condition precedent to the district court's exercise of jurisdiction over the suit. The Rules Enabling Act provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. 2072(b). Federal Rule of Civil Procedure 82 states, moreover, that the Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts." To construe Rule 4(j) as excusing compliance with a statutory condition on the government's waiver of sovereign immunity would be contrary to both the Rules Enabling Act and Rule 82.

3. "'Forthwith' connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella* v. *United States*, 732 F.2d 711, 713 (9th Cir. 1984). "In matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours." *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 193 (1900). Even accepting petitioner's declarations in their entirety, it is clear that petitioner's trial counsel made no effort to effect immediate service of the complaint in

this case. The district court was therefore correct in dismissing the complaint without prejudice based on petitioner's non-compliance with the forthwith service requirement.

ARGUMENT

I. THE REQUIREMENT THAT A COMPLAINT UNDER THE SUITS IN ADMIRALTY ACT MUST BE SERVED "FORTHWITH" HAS NOT BEEN SUPERSEDED BY RULE 4(J) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Section 2 of the Suits in Admiralty Act (SAA) requires that the complaint in an SAA case must be served "forthwith" upon the Attorney General and the United States Attorney. 46 U.S.C. App. 742. "'Forthwith' connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella* v. *United States*, 732 F.2d 711, 713 (9th Cir. 1984) (Kennedy, J.) (citing *City of New York* v. *McAllister Bros., Inc.*, 278 F.2d 708, 710 (2d Cir. 1960)); *Black's Law Dictionary* 654 (6th ed. 1990). Petitioner contends, however, that Section 742's requirement of "forthwith service" no longer has the force of law. Specifically, he argues that the adoption of the Federal Rules of Civil Procedure, their subsequent application to admiralty cases, and the promulgation of Federal Rule of Civil Procedure 4(j), setting a general 120-day limit for service of the complaint in federal civil suits, have impliedly repealed the requirement that an SAA complaint be served "forthwith." Pet. Br. 22-24. To support that view, petitioner relies (see Pet. Br. 28-29) on the

Rules Enabling Act of 1934, as amended. That statute provides, in pertinent part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure * * * for cases in the United States district courts * * *.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. 2072.[14]

Petitioner's reliance on Section 2072(b) is misplaced. First, the SAA's requirement that the complaint be served "forthwith" is not "in conflict with" Rule 4(j). Second, to construe Rule 4(j) as superseding the SAA's requirement of forthwith service would impermissibly expand the jurisdiction of the district court, in violation of both 28 U.S.C. 2072(b) and Federal Rule of Civil Procedure 82.

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[14] As petitioner explains (Pet. Br. 31-33), Rule 4(j) was not promulgated by this Court pursuant to the Rules Enabling Act, but was enacted into law as part of the Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2, 96 Stat. 2527 (1983). Section 2072(b)'s references to "such rules" (*i.e.*, rules of procedure prescribed by this Court) are therefore technically inapplicable to Rule 4(j). We agree with petitioner, however, that Section 2072(b) provides the best evidence of congressional intent regarding the proper construction of Rule 4(j) and its interaction with other laws.

A. The SAA's Requirement That The Complaint Be Served "Forthwith" Is Not "In Conflict With" Rule 4(j)

This Court has repeatedly emphasized that, "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotation marks omitted). "Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (quoting *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842)).[15] Nothing in the Rules Enabling Act suggests that this principle is inapplicable to the implementation of the Federal Rules. Section 2072(b) makes clear that a provision of law "in conflict with" a Federal Rule is generally superseded, but it does not suggest that other than the normal analysis is to be employed in determining whether such a conflict exists. In the present case, Section 742 and Rule 4(j) are fully capable of co-existence, and each should therefore be regarded as effective.

1. Rule 4(j) provides, in pertinent part, that, "[i]f a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service

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[15] See also *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion." Rule 4(j) does not confer an affirmative right to take 120 days to serve the complaint. It does not say, for example, that "the complaint may be served at any time within 120 days after filing," or that "no complaint served within 120 days will be dismissed for untimely service." Indeed, the Rule does not by its terms address the proper treatment of complaints that are served within the 120-day period. See *Amella* v. *United States*, 732 F.2d at 713 ("Rule 4(j) sets 120 days as a presumption of unreasonable and dilatory delay in service of the complaint in any civil suit. As such, it fixes an outer limit on service but does not indicate what lesser time period qualifies as forthwith.").[16] There is conse-

[16] Petitioner relies (see Pet. Br. 29-30) on this Court's decision in *Hanna* v. *Plumer*, 380 U.S. 460 (1965). Massachusetts law required in-hand service of a complaint upon the executor or administrator of an estate, *id.* at 462, while Federal Rule of Civil Procedure 4(d) stated that service of the summons and complaint "shall be made as follows: (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." 380 U.S. at 461. The Court held that the Massachusetts rule did not apply, stating that "the clash [between the two provisions] is unavoidable; Rule 4(d)(1) says—implicitly, but with unmistakable clarity—that in-hand service is not required in federal courts." *Id.* at 470.

Hanna is distinguishable in two respects. First, the question whether a state procedural rule should be *incorporated* into federal practice in diversity litigation is different from the

quently no "positive repugnancy" between Section 742 and Rule 4(j), and each may be enforced according to its terms.[17]

Petitioner's only effort to explain why Section 742 is "in conflict with" Rule 4(j) is the statement that "the 'forthwith' requirement of the SAA and Rule 4 service requirements are clearly repugnant since courts have construed the term 'forthwith' as considerably shorter than the 120 days allowed by Rule 4." Pet. Br. 30.[18] In a similar vein, one commentator

question whether a federal statutory provision specifically addressed to SAA litigation should be enforced according to its terms. Indeed, the Court in *Hanna* deemed it "doubtful" that the Massachusetts requirement of in-hand service would have applied in a diversity case even if there had been no pertinent Federal Rule. 380 U.S. at 466. Second, the Court appears to have construed Rule 4(d) as conferring an affirmative right to serve process in any of the specified ways. See also *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749 (1980) (*hanna* analysis applies only where there is "a 'direct collision' between the Federal Rule and the state law"). For the reasons stated in the text, Rule 4(j) confers no affirmative right to take up to 120 days to serve a complaint.

[17] Petitioner argues (Pet. Br. 33) that, "[i]f Congress intended there to be any exception to the general rule it was prescribing [in Rule 4(j)], it certainly could have created exceptions." The requirement that SAA complaints be served "forthwith," however, is not an exception to the rule that any complaint not served within 120 days must (absent a showing of good cause) be dismissed.

[18] Petitioner also relies (Pet. Br. 23, 27) on the 1937 Advisory Committee Notes to Rule 4, which state that Rule 4 "provide[s] a uniform and comprehensive method of service for all actions against the United States," and that other federal statutes "are modified in so far as they prescribe a different method of service or dispense with the service of a summons." Fed. R. Civ. P. 4 advisory committee's note (1937 Adoption). By their

argues that "the 'forthwith' requirement of the SAA and Rule 4(j) directly collide, because by allowing 120 days for service before dismissal, 4(j) treats as timely, service that would be untimely under a forthwith service requirement." G. Reesa, Note, *Rule 4(j) of the Federal Rules of Civil Procedure and the Forthwith Service Requirement of the Suits in Admiralty Act*, 54 Fordham L. Rev. 1195, 1205-1206 (1986). This Court has made clear, however, that, in determining whether a "positive repugnancy" exists between two statutes, "[i]t is not enough to show that the two statutes produce differing results when applied to the same factual situation." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976). See also *United States* v. *Batchelder*, 442 U.S. 114, 121 (1979) (later statute held not to repeal an earlier law even though the two "provide[d] different penalties for essentially the same conduct"). That Rule 4(j) does not itself mandate immediate service does not mean that it conflicts with a statutory provision imposing such a requirement.[19]

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terms, those comments refer to the *method* rather than to the timing of service. Cf. Pet. Br. 10 (noting that "[t]he manner of service on the United States under the SAA and Rule 4 is essentially the same"). The Advisory Committee evidently concluded that a federal statute prescribing a method of service different from that required by Rule 4 was "in conflict with" the Rule and therefore superseded. That conclusion was understandable, given Rule 4's statement that "[s]ervice shall be made as follows"; but it has no bearing on the question whether the SAA's "forthwith" service requirement is "in conflict with" Rule 4(j).

[19] Rule 4(j) unquestionably conveys the implicit message that complaints filed within the 120-day period will not be dismissed *for non-compliance with that Federal Rule*. Nothing in the text of Rule 4(j), however, purports to supersede an independent statutory provision requiring immediate service in a particular category of cases.

2. Nor does continued enforcement of Section 742's forthwith service requirement obstruct the effectuation of the purposes underlying Rule 4(j). Rule 4(j) applies to the full range of civil cases: it reflects Congress's conclusion that a 120-day limit on the time for service generally strikes an appropriate balance between the goal of conducting litigation expeditiously and the goal of discouraging dismissals on grounds unrelated to the merits. The determination that a 120-day limit is generally appropriate (*i.e.*, that *no* plaintiff, absent a showing of good cause, should take more than 120 days to serve a complaint), however, is in no way inconsistent with a requirement of immediate service in a particular category of cases. Congress could have reasonably concluded that there is a special need for expeditious adjudication of admiralty litigation. See note 2, *supra*; see also *Marich* v. *United States*, 84 F. Supp. 829, 832 (N.D. Cal. 1949) (purpose of forthwith service requirement is to provide seasonable opportunity for the government to investigate). Congress could also have concluded that immediate service of the complaint is both more important and more practicable in suits against the government than in litigation against private parties.[20] There is consequently no reason to

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[20] In light of the large volume of suits against the government and the public interest in litigation that may bear on the public fisc, Congress might reasonably seek to increase the precision with which governmental entities may estimate the range of their potential liabilities at a given point in time. The 120-day time limit established by Rule 4(j) may also reflect Congress's recognition that a private defendant may be difficult to locate at the time the complaint is filed. No similar

construe Rule 4(j) as superseding Congress's specific determination of the appropriate period for service in suits brought under the SAA.[21]

3. Petitioner also argues that Congress, in enacting the SAA, intended that actions brought pursuant to it be governed in their entirety by the legal rules applicable to admiralty suits against private defendants. See Pet. Br. 17 ("the plain language of the SAA declared Congress's intent that the government should be treated in the same manner as private litigants"). He states as well that "Congress's more likely intent for including the forthwith requirement in the SAA was simply to provide a time frame for service because no external rule regarding the timeliness of service existed when Congress enacted the SAA in 1920," well before the adoption of the Federal

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practical difficulties attend the requirement that the United States Attorney and the Attorney General must be served "forthwith."

[21] In a closely related context, this Court has noted that "state law is pre-empted to the extent that it actually conflicts with federal law." *English* v. *General Electric Co.*, 496 U.S. 72, 79 (1990). The Court has explained that a "conflict" between state and federal law requiring displacement of the state law occurs "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ibid.* (citation and internal quotation marks omitted). Obviously it is not "impossible" to comply with both Section 742 and Rule 4(j): A complaint that is served "forthwith" will be timely under both provisions. For the reasons stated at pages 21-22, *supra*, enforcement of Section 742's forthwith service requirement in the category of cases to which it applies will not "stand[] as an obstacle to the accomplishment and execution" of the purposes underlying Rule 4(j).

Rules of Civil Procedure in 1938. Pet. Br. 22. Those contentions are incorrect.

a. Section 3 of the SAA provides that, with respect to questions that the Act does not specifically address, SAA suits "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. 743. The statute does not otherwise provide, however, for general uniformity of treatment of governmental and private defendants in admiralty litigation. Indeed, the initial impetus behind the SAA was Congress's recognition that one of the traditional incidents of admiralty practice—the arrest and seizure of the purportedly offending vessel—had proved disruptive and undesirable in suits against the United States. See 46 U.S.C. App. 741 ("No vessel owned by the United States * * * [shall] be subject to arrest or seizure by judicial process in the United States or its possessions."); pages 2-3, *supra*. In other respects as well, the SAA specifies a rule different from that applicable to private admiralty litigation. Suits under the SAA, for example, are subject to a shorter statute of limitations than are other admiralty actions. Compare 46 U.S.C. App. 745 ("Suits as authorized by [the SAA] may be brought only within two years after the cause of action arises.") with 46 U.S.C. App. 763a ("Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued."). Trial by jury is not permitted under the SAA. 46 U.S.C. App. 742 (SAA permits "appropriate nonjury proceeding"). Where the decree is for a money judgment, the court

may award "interest at the rate of 4 per centum until satisfied." 46 U.S.C. App. 743.[22] The fact that the Federal Rules (rather than the rules of local practice)[23] now govern many of the questions that the SAA does not specifically address does not undermine Congress's determination that certain issues (including the timeliness of service of the complaint) should

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[22] Petitioner relies (Pet. Br. 17-18) on this Court's statement in *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314, 324 (1959), that "Congress has expressly declared that when sued under the Suits in Admiralty Act the United States is to have its procedural rights determined and governed in the same manner as private parties." On the next page of its opinion, however, the Court addressed the question whether compound interest had properly been awarded against the United States in that SAA suit. The Court did not suggest that compound interest would have been unavailable in an analogous suit between private parties. It determined, however, that the SAA provision governing interest did not authorize the amounts awarded by the district court. *Id.* at 325. And it concluded that "Congress' demonstrated concern with the problem of interest under the Suits in Admiralty Act indicates that it intended to cover these awards affirmatively and not have them controlled by the general command that the suit 'shall proceed and shall be heard and determined according to the principles of law' applicable to private parties." *Ibid.* The same analysis is controlling here.

[23] When the SAA was enacted, private admiralty litigation in the federal courts was governed by the Admiralty Rules of 1844, superseded shortly after the SAA's passage by the Admiralty Rules of 1920. Those Rules provided little detail with respect to the conduct of in personam admiralty suits, and courts adjudicating such actions often looked to state practice in resolving procedural issues that the Admiralty Rules did not address. See, *e.g.*, *In re Louisville Underwriters*, 134 U.S. 488, 493 (1890); *Doe* v. *Springfield Boiler & Mfg. Co.*, 104 F. 684, 686 (9th Cir. 1900); *Norfolk Southern R.R.* v. *Foreman*, 244 F. 353, 355 (4th Cir. 1917).

be the subject of an SAA-specific rule rather than left to the background principles governing private litigation.[24]

b. Section 743's general provision that SAA litigation should be governed by the rules applicable to private parties is inconsistent with petitioner's speculation (Pet. Br. 22) that Congress chose to require forthwith service only "because no external rule regarding the timeliness of service existed when Congress enacted the SAA in 1920." As Section 743 makes clear, Congress was not under the misimpression that the absence of uniform federal rules of procedure required it to enact a comprehensive code governing the conduct of SAA litigation. To the contrary, Congress was generally content to provide that SAA litigation "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. 743. Congress might have permitted the time for service of the complaint to be similarly governed by the rules applicable to private parties, but it chose instead to insist that the complaint be served "forthwith." The subsequent adoption of the Federal Rules provides no

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[24] Congress has made substantive amendments to the SAA on four occasions since 1920 without deleting the requirement that the complaint be served "forthwith." See Maritime Act of 1981, Pub. L. No. 97-31, § 12(25), 95 Stat. 155 (codified as amended at 46 U.S.C. 743, 747, 749-752); Act of Aug. 29, 1972, Pub. L. No. 92-417, § 3, 86 Stat. 656 (codified as amended at 46 U.S.C. 749); Act of Sept. 13, 1960, Pub. L. No. 86-770, § 3, 74 Stat. 912 (codified as amended at 46 U.S.C. 742); Act of Dec. 13, 1950, ch. 1136, 64 Stat. 1112 (codified as amended at 46 U.S.C. 745).

reason to decline to enforce that requirement according to its terms.

B. Even If Rule 4(j) Were Otherwise Construed To Confer An Affirmative Right To Serve A Complaint At Any Time Within The 120-Day Period, Its Application To SAA Litigation Would Be Contrary To Both 28 U.S.C. 2072(b) And Federal Rule of Civil Procedure 82

Even if Rule 4(j) were otherwise construed to confer an affirmative right to serve a complaint at any time within the 120-day period, its application (so construed) to SAA litigation would expand the jurisdiction of the district courts and would have the effect of altering the parties' substantive rights. Those results would be contrary to the Rules Enabling Act, 28 U.S.C. 2072(b) (the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"), and Federal Rule of Civil Procedure 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.").

1. "It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). It is also well established that "[s]overeign immunity is jurisdictional in nature," and that "the terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *FDIC* v. *Meyer*, 114 S. Ct. 996, 1000 (1994) (brackets and internal quotation marks omitted). Moreover, while "legislation for the benefit of seamen is to be construed liberally in their favor, it is equally true that statutes which waive immunity of the United States from suit are to be construed strictly

in favor of the sovereign." *McMahon* v. *United States*, 342 U.S. 25, 27 (1951). To permit a district court to adjudicate an SAA action in which the statutory preconditions for suit have not been met would effect an expansion of the court's jurisdiction and a modification of the parties' substantive rights. A construction of Rule 4(j) that would supersede the forthwith service requirement of Section 742 is therefore contrary to both 28 U.S.C. 2072(b) and Rule 82.

2. That conclusion is buttressed by the structure of the SAA. Section 742 provides the government's waiver of sovereign immunity ("In cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States") and requires that the complaint be served "forthwith." 46 U.S.C. App. 742. Section 743 governs "[p]rocedure in cases of libel in personam" and provides that SAA litigation "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. 743. The structure of the statute thus suggests that the forthwith service requirement is not simply a procedural provision that applies after the district court has properly assumed jurisdiction over the case. See *United States* v. *Holmberg*, 19 F.3d 1062, 1064 (5th Cir.), cert. denied, 115 S. Ct. 482 (1994); *Libby* v. *United States*, 840 F.2d 818, 820 (11th Cir. 1988). Rather, it is a prerequisite to the plaintiff's invocation of the court's jurisdiction in the first instance. See *Amella* v. *United States*, 732 F.2d at 713. Section 742's requirements must therefore be satisfied before the statutory waiver of

sovereign immunity may be given effect. *Holmberg*, 19 F.3d at 1064. See also *Battaglia* v. *United States*, 303 F.2d 683, 685 (2d Cir.) ("There can be little doubt of the power of the sovereign to declare the manner in which it may be haled into court."), cert. dismissed, 371 U.S. 907 (1962).

3. There is nothing remarkable about the proposition that a rule requiring particular documents to be filed at a specified time can be "jurisdictional" in nature. The courts have recognized, for example, that the administrative claim requirement of the Clarification Act is a jurisdictional rule. See, *e.g.*, *Rodinciuc* v. *United States*, 175 F.2d 479, 481 (3d Cir.) ("A clear failure to comply with the conditions laid down by statute for suits against the United States may not be waived."), cert. denied, 338 U.S. 895 (1949); *Danstrup* v. *The Richmond P. Hobson*, 112 F. Supp. 851, 855 (E.D.N.Y. 1953) (Clarification Act's administrative claim requirement "involves the proper fulfillment of a statutory condition to bringing an action against the United States," and plaintiff's failure to comply with that condition "requires that the court dismiss the libel on the ground of lack of jurisdiction").[25]

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[25] The courts have consistently reached the same conclusion with respect to the administrative claim requirement of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2675. See, *e.g.*, *Cook* v. *United States on behalf of U.S. Department of Labor*, 978 F.2d 164, 166 (5th Cir. 1992) (compliance with administrative claim requirement "is a jurisdictional prerequisite to filing suit under the FTCA"); *Meridian International Logistics, Inc.* v. *United States*, 939 F.2d 740, 743 (9th Cir. 1991) (same); *Cotto* v. *United States*, 993 F.2d 274, 280 (1st Cir. 1993) (same). Federal Rule of Civil Procedure 3 provides that "[a] civil action is commenced by filing a complaint with the court,"

II. THE DISTRICT COURT CORRECTLY DISMISSED PETITIONER'S COMPLAINT WITHOUT PREJUDICE FOR FAILURE TO EFFECT SERVICE "FORTHWITH"

"'Forthwith' connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella* v. *United States*, 732 F.2d at 713. "In matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours." *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 193 (1900). "Statutes, judgments, orders and contracts requiring an act to be done in a certain number of days contemplate an allowance of a certain personal convenience to perform the act, so long as it is done within the period. A 'forthwith' requirement on the other hand does not contemplate any such convenience." *California Casualty Indemnity Exchange* v. *United States*, 74 F. Supp. 404, 407 (S.D. Calif. 1947). Rather, "[t]he word has a peremptory connotation, even more so than the word 'immediately.'" *Ibid.* See also *United States* v. *Bradley*, 428 F.2d 1013, 1016 (5th Cir. 1970) ("The command of 'forthwith' clearly will not tolerate delay when deliberate and made by the officers for the purpose of selecting their own time and for their own purpose") (internal quotation marks omitted).

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and the Federal Rules do not require plaintiffs to make formal statements of claim prior to filing suit. No one would suggest, however, that the Federal Rules supersede a statutory directive that an administrative claim must be filed as a prerequisite to a particular form of litigation against the government.

The process by which a federal civil complaint is ordinarily filed and served has been described as follows:

> In federal practice the clerk issues the summons. (Under [Federal Rule of Civil Procedure 4(b)], it is signed by the clerk and bears the seal of the court.) This does not necessarily mean that the clerk drafts the summons. The usual practice is for the plaintiff's attorney to obtain from the clerk as many summons copies as are needed, filling them out back at the office when the complaint is drawn. * * *
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> * * * * *
>
> * * * [T]he typical procedure is for the plaintiff, when filing the complaint, to have the summons all filled out and ready to tender to the clerk, who can scan it and, if it is in order, "issue" it. * * *
>
> At one time, when the marshals were the chief summons servers in federal practice, the clerk would either forward the summons through channels to the marshal's office or give it to the plaintiff to deliver to the marshal. Now * * * the standard practice is for the clerk, after "issuance", to hand the summons or summonses back to the plaintiff for service. It is now the plaintiff's responsibility.

D. Siegel, *Practice Commentaries*, 28 U.S.C.A. Fed. R. Civ. P. 4, at 85, 96-97 (1992). Thus, the plaintiff in a federal civil action typically (1) obtains summons forms and prepares the summons *before* the complaint is filed, and (2) files the complaint by hand, thus

facilitating immediate issuance and receipt of a signed, sealed summons. Where that procedure is followed, there is no reason that the complaint and summons cannot be served on the United States Attorney, and mailed to the Attorney General, within 24 hours after the complaint is filed.

Accepting petitioner's declarations as true, it is clear that petitioner's trial counsel made no effort to comply with the SAA's requirement that the complaint be served "forthwith." Counsel did not obtain or complete summons forms before filing the complaint, and he does not appear to have filed the complaint by hand.[35] Petitioner's declarations indicate that the untimeliness of service was exacerbated by mistakes in the office of the district court clerk. By the time those problems arose, however, petitioner had already breached his obligation to serve the complaint "forthwith." And even after those problems came to light, counsel's efforts to obtain the relevant documents were limited to sporadic mail communications with the office of the clerk. In short, this is not a case in which counsel made diligent efforts to effect service immediately after filing but was pre-

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[35] Although petitioner's declarations are not entirely clear on this point, petitioner's brief implies that the complaint was filed by mail. See Pet. Br. 4-5 ("At the same time [petitioner] filed his complaint, he requested the appropriate summons forms and file stamped copies of the complaint. However, these summons forms were not sent to [petitioner's] counsel, as requested, with the file stamped copies of the complaint.") (citations omitted). To the extent that filing by hand would have been burdensome, it would have been so only because of trial counsel's unexplained decision to file suit in the Galveston Division rather than in the Houston Division. See page 9 and note 10, *supra*.

vented from doing so by factors beyond his control. The district court therefore acted correctly in dismissing the complaint without prejudice based on petitioner's non-compliance with Section 742.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Rules Enabling Act, 28 U.S.C. 2071 *et seq.*, provides in pertinent part:

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

2. The Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, provides in pertinent part:

§ 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy

thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States or such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

§ 743. Procedure in cases of libel in personam

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall

be required to give any bond or admiralty stipulation on any proceeding brought hereunder.

3. Rule 4(j) of the Federal Rules of Civil Procedure (1988) provides:

Rule 4. Process

* * * * *

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

4. Rule 82 of the Federal Rules of Civil Procedure provides:

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391-93.

Supreme Court, U.S.
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No. 95-232

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LLOYD HENDERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the 120-day service requirement of Federal Rule of Civil Procedure 4 supplants the forthwith service requirement found in the Suits in Admiralty Act ("SAA").

II. If the 120-day service requirement of Rule 4 does not supplant the forthwith service requirement found in the SAA, whether district courts may extend the time for service provided by the SAA under appropriate circumstances.

LIST OF PARTIES

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REPLY BRIEF FOR PETITIONER

ARGUMENT AND AUTHORITIES

I. THE 120 DAY SERVICE REQUIREMENT OF RULE 4 SUPPLANTS THE FORTHWITH SERVICE REQUIREMENT IN THE SAA.

A. Rule 4(j) Conflicts With The "Forthwith" Service Requirement In The SAA.

The United States argues that there is in fact no conflict between the SAA and Rule 4(j) and that effect can be given to both statutes. The United States contends that Rule 4(j) and Section 742 of the SAA are not in conflict because Rule 4(j) does not necessarily confer a right to an absolute 120 days in which to serve the complaint. (Br. for the United States at 18). The United States also argues that although the rules may produce differing results, this is not enough to establish that the statutes

are in conflict. *See Radzanower v. Touche, Ross & Company*, 426 U.S. 148, 155 (1976); *United States v. Batchelder*, 442 U.S. 114, 121 (1979). (Br. for the United States at 19-20).

Although Rule 4 allows 120 days for service, under the SAA, any time period greater than approximately 58 days is not "forthwith." (Br. for Petitioner at 34). Because courts have interpreted the term "forthwith" to allow only approximately half the time for service as allowed under Rule 4, the rules are inconsistent. The United States' argument also ignores the fact that Rule 4 allows an extension of time for service upon a showing of "good cause," while the "forthwith" requirement does not. In other words, under Rule 4, a court has the discretion to extend the time limit for service, while under the SAA, the court must dismiss the suit upon a finding that service was not "forthwith."

The United States also relies upon Supreme Court authority indicating that as long as the statutes are not repugnant, the Court must give effect to both. *See Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1018 (1984); *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992); *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974).[1] (Br. for the United States at 17).

[1] None of the cases relied upon by Petitioner involves a conflict between a federal rule of procedure and a federal statute. These cases involve repeals by implication, in direct contrast to the present case which involves a federal rule promulgated pursuant to the Rules Enabling Act which expressly repealed all conflicting laws. *See, e.g., Penfield Co. v. Securities and Exchange Commission*, 330 U.S. 585, 589 n.5 (1947) ("where a Rule of Civil Procedure conflicts with a prior statute, the rule prevails"); *Griffith v. N.L.R.B.*, 545 F.2d 1194, 1197 n.4 (9th Cir. 1976) ("federal statutes are superseded by conflicting federal rules."); *American Federation of Musicians v. Stein*, 213 F.2d 679, 685- 686 (6th Cir. 1954) ("the Federal Rules of Civil Procedure have the force and effect of statutes, and if there is a conflict between procedure provided in an earlier Act of Congress and that provided by the rules, the former must yield to the latter").

However, this Court has held that a construction of a statute that produces incongruous results should not be accepted. *NLRB v. Lion Oil Co.*, 352 U.S. 282, 287 (1957); *United States v. Dow*, 357 U.S. 17, 25 (1958). Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). While a statuary waiver of sovereign immunity is to be strictly construed, congressional adoption of broad statutory language authorizing suits against the United States is not to be thwarted by an unduly restrictive interpretation. *Canadian Aviator Limited v. United States*, 324 U.S. 215, 222 (1945). Likewise, where an otherwise acceptable construction of a federal statute would raise serious constitutional problems, the United States Supreme Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *New York v. United States*, 505 U.S. 144 (1992); *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). Therefore, this Court should conclude that Rule 4 supplants the "forthwith" requirement in the SAA.

1. *The Provisions Of The SAA Negate An Unnecessarily Strict Interpretation Of The "Forthwith" Service Requirement.*

The United States argues that requiring "forthwith" service in admiralty cases is not inconsistent with the 120 day time limit in Rule 4. In other words, the government contends that it has an interest in expeditious service in admiralty litigation involving the government and it is not inconsistent with Rule 4 to require immediate service in certain cases. (Br. for the United States at 21). However, the "forthwith" requirement does not appear in any other statute involving a waiver of the government's sovereign immunity. *E.g.*, 28 U.S.C. §§ 1346(b), 2671-2680; (Br. for Petitioner at 26). In fact, similar statutes based upon the government's waiver of sovereign

immunity such as the Federal Tort Claims Act are governed by Rule 4. This claim is also inconsistent with the fact that seamen are considered "wards of admiralty." *See, Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246 (1942).

Equally untenable is the United States' contention that the SAA does not provide for general uniformity of treatment of governmental and private defendants in admiralty litigation. (Br. for the United States at 23). In short, the United States claims that the SAA specifies different rules than applicable to private admiralty litigation in that suits under the SAA: (1) are subject to a shorter statute of limitations; (2) trial by jury is not permitted under the SAA; and (3) the statute provides for prejudgment interest at the rate of 4%. (Br. for the United States at 23-24). Although the government concedes that Section 743 of the SAA provides that such suits "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties," the government indicates that this provision only applies "to questions that the act does not specifically address." (Br. for the Government at 23).

First, section 743 does not, as the government asserts, specify that the provision only applies to matters the Act does not address. Second, the provisions of the SAA cited by the Government are primarily substantive provisions and do not involve matters of procedure. By enacting Rule 4 of the Federal Rules of Civil Procedure, Congress intended to create a "uniform and comprehensive method of service in all actions against the United States." H. Doc. 588, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, 75th Cong., 3d Sess. (1938). In 1966, the federal rules, including Rule 4, were specifically applied to admiralty litigation. 112 CONG. REC. 4053 (1966); H. Doc. 391, 89th Cong., 2d Sess. (1966). Therefore, Congress intended the federal rules of procedure to supercede inconsistent statutory provisions governing service.

In fact, the Clarification Act of March 24, 1963, ch. 26, § 1, 57 Stat. 45, which the government discusses as providing an action for claims arising from employment in the crew of vessels owned by the United States through the Maritime Administration also supports Petitioner's claim. (Br. for the United States at 6-7). The statute provides that "officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to . . . death injuries, illness, maintenance and cure, loss of effects, detention or repatriation, . . . *have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels.*" (emphasis supplied). The language in this statute that seamen are to have "all the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States" further supports Petitioner's position that the legislature did not intend to create different rules of procedure governing seamen than private parties. This provision clearly establishes Congress's intent to place the government and private parties on equal terms.

The United States also tries to distinguish an opinion upon which Petitioner relies, *United States v. Isthmian S.S. Co.*, 359 U.S. 314, 324 (1959), in support of his claim that in enacting the SAA, Congress intended to treat seamen injured aboard government vessels and private litigants equally. (Br. for the United States at 24, n.22). The principle issue in that case was whether in an action brought under the SAA against the Government to recover costs incurred in transporting cargo, the government could file a cross-libel to recover on an unrelated debt owed by the claimant. The Supreme Court

concluded that the Government could not maintain their cross-libel within the same suit and was required to bring a separate action in a United States District Court. *Id.* at 324. The Court reasoned that Congress expressly declared that when sued under the Suits in Admiralty Act, the United States is to have its procedural rights determined and governed in the same manner as private parties. *Id.* at 324.

The Court later concluded that the district court improperly failed to award interest as provided in the SAA, and that Congress intended to cover interest awards affirmatively and not have them controlled by the general command that the suit "shall proceed and shall be heard and determined according to the principles of law" applicable to private parties. *Id.* The United States apparently takes the position that because this language in the SAA is inapplicable to allow other statutes to govern interest awards, this provision is also inapplicable to the "forthwith" requirement. However, an award of interest clearly involves a matter of substantive law and not procedure, which is the issue in this case. Furthermore, there is no comprehensive federal code or rules governing interest awards in all cases, in marked contrast to service of process which is governed by the federal rules of civil procedure at issue here. Consequently, this language of the SAA also supports the claims made by Petitioner in this case.

2. *Because The Federal Rules Of Procedure Were Not In Effect At The Time The SAA Was Enacted, The Service Provisions Of Rule 4 Are Controlling.*

The United States also argues that Petitioner's claim that the "forthwith" requirement was included in the SAA because no rules of procedure existed at that time is contradicted by the provision in Section 743 that SAA litigation "shall proceed and shall be heard and determined according to the principles of law and to the rules of

practice obtaining in like cases between private parties." (Br. for the United States at 25). In other words, the government asserts that by including the "forthwith" requirement, Congress created an exception to the rule that the time for service would be governed by the rules applicable to private parties. Again, the language in Section 743 supports Petitioner's claim because it indicates Congress's intent that suits against the Government should proceed in the same manner as suits between private parties. Clearly, without any rules of procedure in effect at the time the SAA was enacted, Congress had to provide some guidelines governing service on the Government.

In fact, the legislative history upon which the United States relies in its response support the claims raised by petitioner in this case. In its brief, the United States references a hearing in 1910 before the subcommittee of the Senate Judiciary Committee in which the "forthwith" requirement is briefly mentioned. (Br. for the United States at pp. 4-5 n.5); AMENDMENTS TO ADMIRALTY LAW: HEARINGS BEFORE THE SUBCOMMITTEE OF THE SENATE COMMITTEE ON THE JUDICIARY, 61st Cong., 2d Sess. 16 (1910). During that hearing Senator Brandegee inquires when service should occur. In response, Archibald G. Thacher, Procter In Admiralty, who appeared before the subcommittee replied, "I should say serve 'forthwith'. There is no reason why it should be not be done promptly after the filing of the libel." According to the government, the next version of the bill contained the requirement that the libel be served "forthwith" and there is no other legislative history discussing the term "forthwith." Although this discussion is cited by the United States, it supports Petitioner's position that at the time the SAA was enacted there were no rules of procedure governing service of process; consequently, this provision was included because otherwise there was no time limit for service of process.

The United States also argues that Petitioner's reliance on the 1937 Advisory Committee notes to Rule 4 is mis-

placed because the notes merely state that Rule 4 "provides a uniform and comprehensive *method* of service for all actions against the United States." (Br. for the United States at 19, n.18); H. Doc. 588, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, 75th Cong., 3d Sess. (1938). The Government's conclusion that the term "method" does not include timing of service is incorrect, especially given the fact that Rule 4 included a requirement that service was to be made "forthwith" when the rules of procedure were adopted in 1938. H. Doc. 460, 75th Cong., 3d Sess. (1938). Although Petitioner states in his brief that the "method" of service on the United States under the SAA and Rule 4 are "essentially the same" (Petitioner's Br. at 10), the two statutes are different in that the SAA requires service by registered mail to the Attorney General of the United States, while Rule 4 allows service by registered or certified mail to the Attorney General of the United States. Even though these distinctions are not in issue in the present case, Petitioner does not concede that there is no conflict between the manner of service in these provisions.

The United States also attempts to distinguish the Third Circuit's decision in *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 66 (3d Cir. 1985), on the grounds that the decision was merely dictum since the Third Circuit held that it lacked jurisdiction under the SAA and that jurisdiction existed only under the Federal Tort Claims Act. (Br. for the United States at 12 n.13). This is an incorrect interpretation of this opinion, since the sole issue in the case was whether in an admiralty suit against the United States under the SAA, Rule 4 supersedes the "forthwith" requirement of the SAA. 772 F.2d at 63. The court in *Jones & Laughlin Steel* noted in the case that it believed that because the plaintiff did not allege that a vessel of the United States caused its damage, the applicable statute was the FTCA. *Id.* at 65. However, because this argument was never raised, the Court addressed the merits of the district court's interpretation of the SAA. *Id.* The court precisely held that Rule 4 governs service in actions based on the FTCA and the SAA. *Id.* at 66. As in *Jones & Laughlin Steel*, this Court should find that the service provision of Rule 4 governs the service provision in the SAA.

B. The Application Of Rule 4(j) To The SAA Is In Harmony With The Rules Enabling Act And Rule 82 Of The Federal Rules Of Civil Procedure.

The United States argues that to construe Rule 4(j) as superseding the SAA's requirement of "forthwith" service would expand the jurisdiction of the district court in violation of the Rules Enabling Act, 28 U.S.C. § 2072, and Rule 82 of the Federal Rules of Civil Procedure. (Br. for the United States at 26). In support of this argument the government relies upon authority discussing that sovereign immunity is jurisdictional in nature and that statutes which waive immunity of the United States are to be strictly construed in favor of the sovereign. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *McMahon v. United States*, 342 U.S. 25, 27 (1951); *FDIC v. Meyer*, 114 S.Ct. 996, 1000 (1994).

However, in a precisely analogous case, the Supreme *Court in Mississippi Publishing Corporation v. Murphree*, 326 U.S. 438, 443 (1946), considered whether Rule 4(f) of the Rules of Civil Procedure which provided that process "may be served anywhere within the territorial limits of the state in which the district court is held" contravenes the provisions of the Rules Enabling Act which states that the rules "shall neither abridge, enlarge, or modify the substantive rights of any litigant," or Rule 82 which provides that the rules "shall not be construed to extend or limit the jurisdiction of the district courts. . . ." The court stated that Rule 4(f) and Rule 82 must be construed together, and that Rule 82 refers to venue and jurisdiction of the

subject matter of the district court, while Rule 4(f) concerns the means of bringing the defendant before the court which already has venue and jurisdiction of the subject matter. *Id.* at 444-445. The Court reasoned that Rule 4(f) does not enlarge or diminish the venue of the district court, or its power to decide the issues of the suit, which is jurisdiction of the subject matter to which Rule 82 must be taken to refer. "Rule 4(f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained." *Id.* at 445. Therefore, the Court concluded that Rule 4(f) and Rule 82 were consistent. *Id.*

The Court also concluded that Rule 4(f) is consistent with the Rules Enabling Act. The Court reasoned that:

> Undoubtedly, most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. . . . The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court . . . will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to the manner and the means by which a right to recover . . . is enforced. In this sense the rule is a rule of procedure and not of substantive right, and is not subject to the prohibition of the Enabling Act. *Id.* at 446. (citations omitted).

As in *Murphree*, Rule 4(d) does not abridge any substantive rights and is consistent with the Rules Enabling Act and Rule 82.

II. THE FAILURE TO APPLY RULE 4 TO THE SAA RESTRICTS THE DISTRICT COURT'S POWER TO EXTEND THE TIME FOR SERVICE UPON A SHOWING OF GOOD CAUSE.

Finally, the United States criticizes the fact that the complaint in this case was filed in the Galveston Division of the Southern District of Texas rather than in the Houston Division. (Br. for the United States at 9). Suits under the SAA may be brought "in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found." 46 U.S.C. § 742. There is no dispute that the complaint in this case was filed in the Southern District of Texas where Petitioner resided. (App. 5). The statute does not require that the complaint be filed in a particular division of the district where the claimant resides. Additionally, this claim is raised for the first time in this Court.

Equally disingenious is the United States' challenge to Petitioner's method of obtaining the appropriate summons forms and complaint by mail and argument that Petitioner's failure to follow routine practice resulted in the lack of "forthwith" service. The United States asserts that Petitioner should have: (1) obtained summons forms and prepared the summons forms before the complaint was filed; and (2) filed the complaint by hand, thus facilitating immediate issuance and receipt of a signed, sealed summons. (Br. for the United States at 9-10, 30-31). However, there is nothing in the rules of procedure which prohibit a request for the appropriate forms by mail. The district court obviously concluded that diligence was exercised when it initially granted Petitioner an extension of time to serve the government. (App. 15). The record is also clear that it was the district clerk's delay in forwarding the appropriate forms which resulted in the delay in service. (App. 52, 59-67).

As discussed above, Petitioner believes that Rule 4 supplants the "forthwith" requirement of the SAA. Alternatively, Rule 4 of the Federal rules of civil procedure should be read in conjunction with the SAA so that the district court can determine whether service is "forthwith" based upon the standard in Rule 4. This Court's adoption of Rule 4 in cases involving the SAA would promote justice by allowing district courts to extend the time for service upon a showing of "good cause," such as existed in this case.

CONCLUSION

For the reasons set forth in this brief, the judgment of the court of appeals should be reversed and the case should be remanded to the district court for a trial on the merits.

Respectfully submitted,

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